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EDITOR'S NOTE

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No. 86-1552-CFX
Status: GRANTED

Title: Department of the Navy, Petitioner
v.
Thomas E. Egan

Docketed:
March 26, 1987

Court: United States Court of Appeals for the Federal Circuit

Counsel for petitioner: Solicitor General

Counsel for respondent: Nold,William J.

Entry	Date	Note	Proceedings and Orders
1	Feb 13 1987		Application for extension of time to file petition and order granting same until March 26, 1987 (Chief Justice, February 18, 1987).
2	Mar 26 1987	G	Petition for writ of certiorari filed.
3	Apr 30 1987		Brief amicus curiae of Ralph B. Bogdanowicz filed.
4	May 6 1987		DISTRIBUTED. May 21, 1987
5	May 7 1987		Brief of respondent Thomas E. Egan in opposition filed.
6	May 26 1987		Petition GRANTED.
			***
7	Jun 8 1987	G	Motion of the Solicitor General to dispense with printing the joint appendix filed.
8	Jun 26 1987		Motion of the Solicitor General to dispense with printing the joint appendix GRANTED.
10	Jun 26 1987		Order extending time to file brief of petitioner on the merits until August 10, 1987.
11	Jul 27 1987		Record filed.
12	Aug 10 1987		Brief amicus curiae of Washington Legal Foundation filed.
13	Aug 10 1987		Brief of petitioner Dept. of Navy filed.
14	Sep 2 1987	D	Motion of Ralph B. Bogdanowicz for leave to participate in oral argument as amicus curiae, for divided argument and for additional time for oral argument filed.
16	Sep 9 1987		Order extending time to file brief of respondent on the merits until October 13, 1987.
20	Oct 9 1987		SET FOR ARGUMENT. Wednesday, December 2, 1987. (3rd case).
17	Oct 13 1987		Brief amicus curiae of National Federation of Federal Employees filed.
18	Oct 13 1987		Brief amicus curiae of AFL-CIO filed.
19	Oct 13 1987		Brief amicus curiae of Ralph B. Bogdanowicz filed.
21	Oct 13 1987		Brief amici curiae of ACLU, et al. filed.
23	Oct 15 1987		Ten copies of lodgings received.
22	Oct 19 1987		Brief of respondent Thomas E. Egan filed.
25	Oct 30 1987		CIRCULATED.
24	Nov 2 1987		Motion of Ralph B. Bogdanowicz for leave to participate in oral argument as amicus curiae, for divided argument and for additional time for oral argument DENIED.
26	Nov 23 1987		Lodging received.
27	Nov 23 1987	X	Reply brief of petitioner Dept. of Navy filed.
28	Dec 2 1987		ARGUED.

PETITION FOR WRIT OF CERTIORARI

86 1552 (1)

No.

Supreme Court, U.S.
FILED
MAR 26 1987
[illegible]NIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1986

DEPARTMENT OF THE NAVY, PETITIONER

v.

THOMAS E. EGAN

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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QUESTION PRESENTED

Whether, in the course of reviewing the removal of an employee for failure to maintain a required security clearance, the Merit Systems Protection Board is authorized by statute to review the substance of the underlying decision to deny or revoke the security clearance.

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In the Supreme Court of the United States

OCTOBER TERM, 1986

No.

DEPARTMENT OF THE NAVY, PETITIONER

v.

THOMAS E. EGAN

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

The Solicitor General, on behalf of the Department of the Navy, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra,* 1a-42a) is reported at 802 F.2d 1563. The opinion of the Merit Systems Protection Board (App., *infra,* 43a-60a) is reported at 28 M.S.P.R. 509. The earlier decision by a presiding official of the MSPB (App., *infra,* 61a-68a) is unreported.

JURISDICTION

The judgment of the court of appeals (App., *infra,* 69a) was entered on October 1, 1986. A petition for rehearing and a suggestion for rehearing en banc were denied on November 26, 1986 (App., *infra,* 71a), and December 8, 1986 (App., *infra,* 70a), respectively. On February 18, 1987, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including March 26, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The pertinent statutory provisions, 5 U.S.C. 7512, 7513, 7532, and 7701, are set forth in App., *infra,* 72a-75a.

STATEMENT

1. Respondent Thomas E. Egan was hired at the Trident Naval Refit Facility in Bremerton, Washington, on the condition that he subsequently receive a security clearance (App., *infra,* 1a-2a). The position for which he was hired, Laborer Leader, was "developed to support quick turnaround repair, replenishment and systems checkout of the TRIDENT submarine over its extended operating cycle" (C.A. App. 3).[1] All positions at the facility were classified as sensitive, requiring incumbents to "qualify for and maintain eligibility for a security clearance as a condition of employment" (*id.* at 35). In particular, the position for which respondent was hired entailed "access to classified information regarding arrival/departure of submarines and access to classified/restricted areas of equipment aboard the submarines" (*id.* at 44).

Following a National Agency Check, the Department of the Navy determined to "deny/revoke" respondent's security clearance based upon various criminal records in California and Washington reflecting convictions for assault and for being a felon in possession of a gun, and based upon his failure to disclose on his application for federal employment two convictions for carrying a loaded firearm. The Navy also relied upon respondent's own statements that he had had drinking problems in the past and that he had served the final twenty-eight days of one sentence in an alcohol rehabilitation program. App., *infra,* 2a-3a.

Respondent answered the Navy's notice of denial of his clearance, asserting that he had paid his debt to society for his convictions, that he had not listed convictions older than seven years because he did not interpret the employment form as requiring that information, and that he believed that alcohol had not been a problem for the three years preceding the clearance determination. He also provided favorable material from supervisors concerning his background and character. The Director of Naval Civilian Personnel Command, after considering this response, stated that the information provided did "not sufficiently explain, mitigate, or refute the reason(s) on which the intended denial/revocation action is based" (App., *infra,* 3a). Accordingly, the decision to revoke respondent's security clearance was affirmed. Because respondent was no longer eligible for the position for which he had been hired, and because reassignment to a nonsensitive position at the Facility was not possible, the Navy issued a notice of proposed removal. *Id.* at 3a-4a.

2. The removal became effective on July 15, 1983. Respondent then sought review of his removal by the Merit Systems Protection Board (MSPB or Board) pursuant to 5 U.S.C. 7513(d).[2]

a. The MSPB presiding official ruled that the Board had authority to review the propriety of the underlying security clearance denial. She ruled that the agency must define specific criteria used in its security clearance decisions and show that the criteria are rationally related to national security concerns. Citing the Board's decision in

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[1] "C.A. App." cites are to the appendix to the government's brief in the court of appeals.

[2] 5 U.S.C. 7532 provides that "the head of an agency" may suspend an employee "when he considers that action necessary in the interests of national security" and after specified procedures may remove a suspended employee when "he determines that removal is necessary or advisable in the interests of national security." Removals under Section 7532 are not subject to MSPB review (see 5 U.S.C. 7512(A)). However, the Navy did not invoke Section 7532; accordingly, the removal action was subject to MSPB review as provided in 5 U.S.C. 7513.

Schwartz v. *Department of the Army*, 16 M.S.P.R. 642 (1983), she stated that the agency must show by a preponderance of evidence that the employee's acts precipitating the denial of the security clearance actually occurred and that it must also show "how an employee's alleged misconduct has an actual or potentially [*sic*] detrimental effect on national security interests" (App., *infra*, 63a). The presiding official held that the agency must persuade the Board that its decision to deny or revoke a security clearance was "reasonable" (*ibid.*). *Id.* at 4a-5a, 62a-64a.

The presiding official concluded that it was not possible to determine whether the Navy's determination to deny respondent's security clearance was reasonable because the Navy did not submit a list of criteria used in making clearance determinations or justify such criteria, and did not present evidence that it had "conscientiously weighed" the circumstances surrounding respondent's misconduct and "reasonably balanced" the misconduct against national security interests (App., *infra*, 65a).

b. The Navy petitioned the full Board for review of the presiding official's determination. The MSPB had before it numerous petitions for review raising similar issues of law and treated the present case as the lead case. The MSPB formally invited and received briefs from interested agencies, employee organizations, and others concerning the proper scope of its review of security clearance determinations, the appropriate remedy if review is available and the determination is adverse to the agency, and whether 5 U.S.C. 7532 is the exclusive authority for removals based upon national security concerns (49 Fed. Reg. 48623 (1984) and 50 Fed. Reg. 2355 (1985)).

The Board found that the statutory language giving it jurisdiction to review adverse personnel actions does not indicate the extent of the Board's authority to review underlying clearance determinations and that the legislative history of the Civil Service Reform Act of 1978 (CSRA), 5 U.S.C. 1201 *et seq.*, contains no indication of congressional intent to permit Board review of the merits of such determinations. It noted that security clearance determinations are committed by Executive Order No. 10,450, 3 C.F.R. 936 (1949-1953), *reprinted in* 5 U.S.C. 7311 note (App., *infra*, 75a-86a), to the discretion of executive agency heads charged with the protection of national security information; that the Board had, analogously, declined to review certain military decisions and other determinations committed to other bodies; and that review of security clearance determinations would "inevitably" entail "exposition of highly sensitive materials and Board determinations on matters of national security" (*id.* at 53a). The Board declined to follow *Hoska* v. *Department of the Army*, 677 F.2d 131 (D.C. Cir. 1982), on the ground that while the court there reviewed the merits of a security clearance revocation, it did not discuss the authority of the Board to do so and it applied a standard of review different from that applicable to Board review.[3] App., *infra*, 6a-7a, 46a-54a.

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[3] In *Hoska*, a civilian employee of the Army was terminated for failure to maintain a security clearance necessary for his position. The MSPB affirmed the termination. The District of Columbia Circuit (which had jurisdiction to review the MSPB decision because the matter arose prior to the Federal Courts Improvement Act of 1982, 28 U.S.C. 1295(a)(9)) reversed. Although it purported to require only "some rational nexus between the adverse action taken and the government's articulated reasons for the action" (677 F.2d at 137), the court was in some instances clearly second-guessing the security clearance determination. See, *e.g.*, *id.* at 143-144 (footnote omitted) ("[e]ven if an incident such as this one could rationally be viewed as involving 'immoral or notoriously disgraceful conduct,' it is not clear from the Army's evidence that it is of a serious enough degree – an inquiry mandated by the Army Regulation – to justify revocation of petitioner's security clearance"); see also 677 F.2d at 144 n.21. The

The Board concluded that it "has no authority to review the agency's stated reasons for the security clearance determination" in the course of reviewing an otherwise reviewable adverse personnel action resulting in whole or part from the clearance determination (App., *infra*, 54a). The Board added, "However, [we] will review the procedures utilized by the agency to ensure that the agency afforded the appellant procedural due process" (*ibid.*). Specifically, the Board held that where an adverse personnel action is based upon the denial or revocation of a security clearance, the Board's review would be limited to determining that the position required a security clearance, that the employee did not qualify for or maintain eligibility for that clearance, and that the agency had afforded the employee procedural due process (which the Board held to consist, at a minimum, of notice, a statement of reasons for a negative decision, and an opportunity to respond) before taking adverse action (*ibid.*). Applying these requirements to the present case, the Board sustained the Navy's action denying respondent's clearance (*id.* at 58a-60a).[4]

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government did not seek certiorari, in part because future appeals from MSPB decisions would be to the Federal Circuit.

MSPB presiding officials relied on *Hoska* in holding that they have authority to second-guess security clearance determinations and to order clearances restored. See *Skees* v. *Department of the Navy*, No. PHO7528410257 (M.S.P.B. June 14, 1984), slip op. 13; *Peterson* v. *Department of the Navy*, No. BNO7528410010 (M.S.P.B. Feb. 14, 1984), slip op. 8; *Irving* v. *Department of the Navy*, No. BNO7528410005 (M.S.P.B. Feb. 3, 1984), slip op. 9. It was such decisions generated by *Hoska* that led the Board to examine the scope of its review authority in this case.

[4] In light of its determination of the appropriate extent of review, the Board concluded that it would not in any event have authority to order an agency to restore a security clearance (App., *infra*, 55a). Where an agency failed to provide proper procedures, the Board's remedy would be to order the employee restored to pay status and to remand to the agency to remedy the procedural defects (*id.* at

3. Respondent appealed to the United States Court of Appeals for the Federal Circuit. By a divided vote, the court reversed the Board's decision that it has no authority to review the substance of security clearance determinations underlying removals and other adverse personnel actions (App., *infra*, 1a-42a).

a. The court of appeals agreed with the Board that 5 U.S.C. 7532 is not the sole authority for removals based upon national security concerns (App., *infra*, 11a-12a). It held, however, that when an agency elects to proceed with a removal without invoking and following Section 7532, its action "carries Board review" (App., *infra*, 12a), including review of the merits of the underlying agency determination to revoke a security clearance (*id.* at 12a-22a). The court stressed that 5 U.S.C. 7701, which prescribes procedures governing Board review of removals and other adverse personnel actions, does not expressly exclude or preclude review of underlying security clearance determinations. Therefore, the court concluded, there is a "strong" presumption in favor of such review (App., *infra*, 13a). "In sum," the court said, "the Board is required to review the agency action taken against [respondent] with the same full process and standards and scope of review, established by law and precedent, as any other adverse action taken under Section 7512" (*id.* at 19a).

Citing *Hoska*, the court stated that the fact that security clearance determinations are "committed to the sound discretion of the agency" (App., *infra*, 24a) does not make them unreviewable. It stated that since the Navy's regulations specify the criteria used in making clearance determinations, the Board is capable of ensuring that those criteria are met and that a nexus exists between the criteria and the employee's ability to safeguard classified information (*id.* at 18a-19a, 24a). The court then remanded to the

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56a-58a). The Board also concluded that 5 U.S.C. 7532 is not the exclusive statutory authority for removals based upon national security concerns (App., *infra*, 55a-56a).

Board for such review, stating that the question of an appropriate remedy for respondent, should the Board rule that a security clearance was improperly denied, was not yet ripe for the court's review (*id.* at 22a-25a).

b. Chief Judge Markey dissented (App., *infra,* 26a-42a). He noted that respondent had been given all the procedural protections to which he was entitled (*id.* at 30a-32a) and that respondent did not contest any of the facts upon which the Navy had based its determination but simply disagreed with the Navy's judgment that he should not be given a security clearance (*id.* at 26a-28a). Chief Judge Markey characterized the decision as an instruction to the MSPB to second-guess the wisdom of security clearance determinations, effectively transferring a discretionary decision vested in executive agencies with responsibility to protect classified information to a body that has neither the responsibility nor the expertise to make such decisions (*id.* at 32a-33a). He suggested that, by severely diluting the ability of responsible agency heads to protect national security information, the panel's decision raised separation of powers concerns as well (*id.* at 37a-39a). He also noted that the Board would be unable to provide an appropriate remedy should it disagree with the merits of a security clearance determination (*id.* at 40a-42a).

REASONS FOR GRANTING THE PETITION

The MSPB ruled, after full and careful consideration, that it does not have authority to review the substance of an agency's determination not to issue a security clearance. The Federal Circuit reversed and directed the MSPB to "review the agency action * * * with the same full process and standards and scope of review, established by law and precedent, as any other adverse action taken under Section 7512" (App., *infra,* 19a); these standards include 5 U.S.C. 7701(c)(1)(A), which provides that the MSPB may sustain

the agency action only if it is supported by a "preponderance of the evidence" presented to the agency at a hearing. The decision below thus subjects every denial of a security clearance to a civilian government employee to de novo review whenever the denial leads to a suspension, removal, or other personnel action reviewable by the MSPB under Section 7513(d). The decision stands as the dispositive ruling on this issue, because the Federal Circuit has exclusive jurisdiction over government petitions and, except in certain discrimination cases, over employee petitions for review of MSPB decisions (see 5 U.S.C. 7703(b) and (d)). The decision will have an important adverse effect on the ability of government agencies to protect the national security, and we believe it is plainly wrong.

1. The President of the United States has the constitutional power and responsibility to determine whether an individual is sufficiently trustworthy to occupy a position in the executive branch that will give him access to sensitive national security information. The President has delegated this responsibility to the heads of certain agencies whose primary functions depend upon the generation or use of sensitive information (see Exec. Order No. 12,356, § 4.1(a), 3 C.F.R. 174 (1983)), and he has required the heads of all executive agencies to establish personnel security programs to protect national security information (see Exec. Order No. 10,450, 3 C.F.R. 936 (1949-1953)).[5]

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[5] Executive Order No. 10,450, promulgated in 1953, provides in part:

> Sec. 2. The head of each department and agency of the Government shall be responsible for establishing and maintaining within his department or agency an effective program to insure that the employment and retention in employment of any civilian officer or employee within the department or agency is clearly consistent with the interests of the national security.

While it sets out detailed procedures, the order nowhere refers to judicial review of adverse determinations. To the contrary, Section 11

Under a long established standard, the grant of a security clearance requires an *affirmative* act of discretion based on a high degree of confidence on the part of the granting official. The general standard is that a clearance may be granted only when "clearly consistent with the interests of the national security." See, *e.g.*, Exec. Order No. 10,450, §§ 2, 7; OPNAVINST[6] 5510.1F, para. 16-100(1) (June 15, 1981) (C.A. App. 26); 10 C.F.R. 710.10(a) (Department of Energy regulation); 32 C.F.R. 156.3(a) (Department of Defense regulation); Department of Defense Directive 5200.2-R, para. 6-100(a) (Dec. 1979). It is possible to state both general considerations (*e.g.*, "loyalty, reliability, and trustworthiness" (see OPNAVINST 5510.1F, para. 16-100(1b) (June 15, 1981) (C.A. App. 26)) on which the decision is based and some specific facts that are pertinent (*e.g.*, "criminal or dishonest conduct," "deception or fraud in applying for enlistment or appointment," "use of intoxicating beverages to excess," other "conduct that indicates poor judgment" (see OPNAVINST 5510.1F, para. 16-102 (June 15, 1981) (C.A. App. 28-30)), but it is often not possible to identify or quantify all of the factors that make it impossible to reach an affirmative judgment in a particular case.

A clearance determination is not an attempt to judge an individual but an attempt to predict his future behavior, to assess whether he is likely, through disloyalty or venality or carelessness or under the compulsion of circumstances beyond his control, to compromise sensitive information. The prediction may be based upon the individual's own past or present conduct, or it may be based upon concerns unrelated to an individual's conduct (for example, where an individual has close relatives residing in a country that

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of the order provided that after the effective date of the order, "the Loyalty Review Board * * * shall not accept agency findings for review, upon appeal or otherwise."

[6] "OPNAVINST" refers to "Chief of Naval Operations Instructions"—*i.e.*, Navy regulations.

is hostile to the United States). These necessarily subjective judgments must be made by those with expertise in making the necessary predictions and—especially because under the "clearly consistent" standard the clearance may not be granted unless an affirmative prediction can be made with confidence—it is not reasonably possible for an outside, inexpert body to review the substance of such a judgment.

Accordingly, this Court has recognized that with respect to employees in sensitive positions it is reasonable that the "agency head who must bear the responsibility for the protection of classified information committed to his custody should have the *final say* in deciding whether to repose his trust in an employee who has access to such information." *Cole* v. *Young*, 351 U.S. 536, 546 (1956) (emphasis added).[7] See also *Adams* v. *Laird*, 420 F.2d 230, 239 (D.C. Cir. 1969), cert. denied, 397 U.S. 1039 (1970) (the standard to be observed in security clearance determinations "is for the President to make in the discharge of his executive functions"); *Greene* v. *McElroy*, 254 F.2d 944, 949 (D.C. Cir. 1958), rev'd on other grounds, 360 U.S. 474 (1959) ("wide latitude in designating persons qualified for access to classified defense information" is a "necessary adjunct to the power and duty to defend the security of the Nation").

By 1978, when the Civil Service Reform Act was enacted, there had never to our knowledge been a case in which a denial of a security clearance to a government employee had been reviewed on the merits, and it appeared well established that an agency's decision to deny such a security clearance was not subject to outside substantive review. As the D.C. Circuit had put the matter, "in the case of a Government employee the courts will not inquire into the merits of a dismissal [for want of a security clearance]: they will inquire whether required procedures have been observed, or an applicable statute violated, but they will not—for example—attempt to determine whether an employee is or is not a 'security risk,' or is 'untrustworthy.'" *Greene* v. *McElroy,* 254 F.2d at 953 (citations omitted); see *Vitarelli* v. *Seaton,* 253 F.2d 338, 342-343 (D.C. Cir. 1958), rev'd on other grounds, 359 U.S. 535 (1959);[8] see also, *e.g., Cafeteria Workers* v. *McElroy,* 367 U.S. 886 (1961) (Navy may summarily exclude from its base a civilian concessionaire worker failing to meet security requirements); *United States* v. *Marchetti,* 466 F.2d 1309, 1318 (4th Cir.), cert. denied, 409 U.S. 1063 (1972) (declining to review secrecy classifications).[9]

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[7] In *Cole*, the Court ruled that the Act of August 26, 1950, as extended to other departments and agencies by Executive Order No. 10,450, did not authorize the dismissal of an employee from a *non*sensitive position. In the present case, there is no doubt that the position in question is a sensitive one, to which the Executive Order No. 10,450 standard ("clearly consistent with the interests of the national security") is applicable. This case does not present the question whether it is ever appropriate for the MSPB to review an agency's determination that a position is a sensitive one.

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[8] The reversal in *Greene* was based on the absence of presidential or congressional authorization for the procedure leading to the dismissal. The reversal in *Vitarelli* was based on procedural flaws in the dismissal. This Court did not contradict the court of appeals' statements in those cases that the merits of security clearance determinations are unreviewable. The government has not in the present case challenged the authority of the MSPB to review the removal and determine, as it did, that the employee received procedural due process in connection with the security clearance determination.

[9] In several cases involving employees of defense contractors, courts of appeals had suggested that there must be a "sufficiency of proof of a nexus between the conduct involved and security clearance." *Gayer* v. *Schlesinger,* 490 F.2d 740, 750 (D.C. Cir. 1973); see *Smith* v. *Schlesinger,* 513 F.2d 462 (D.C. Cir. 1975); *McKeand* v. *Laird,* 490 F.2d 1262, 1264 (9th Cir. 1973) (finding "rational nexus"). However, the decisions, to the extent they were in favor of the employees, were based on failure to follow procedures promulgated by the Department of Defense pursuant to Executive Order No. 10,865, 3 C.F.R. 398 (1959-1963). Because the plaintiffs were employees of defense contractors, no question of statutory rights to civil service review was involved.

The government concurred in the application of the *Gayer* "sufficient proof to support a rational nexus" standard in these cases. We now believe that this was error: while we agree that a government employee is, as a general matter, entitled to (and is afforded under Navy and other agency regulations) notice, a statement of reasons for the denial of a clearance, and an opportunity to respond, the *Gayer* standard leads, as it led the D.C. Circuit in *Hoska,* see page 5 note 3, *supra,* to sheer second-guessing of an agency's determination that a constellation of facts makes it impossible to make the affirmative determination necessary to grant a security clearance.

2. The court of appeals ruled that, nevertheless, provisions of the Civil Service Reform Act, 5 U.S.C. 7512 and 7513, which provide for MSPB review of removals and certain other adverse personnel actions affecting civilian employees of the government, require the MSPB to review the denial of a security clearance on the merits whenever such a denial is the basis for a reviewable adverse action. The court pointed to no specific statutory authority for such review. Its decision rests instead on a supposed presumption of MSPB review arising from the failure of the Act to preclude it expressly (App., *infra,* 12a-13a). This decision was wrong.

The statute does not command or imply review of security clearance determinations. It provides for review of a *removal,* but it neither provides nor suggests a presumption that all other agency decisions become reviewable on their merits whenever they lead, immediately or eventually, to a reviewable removal. To the contrary, the Board, affirmed by the Federal Circuit, has frequently treated such other agency decisions, particularly when made by the military, as not subject to MSPB review on the merits, even when a consequence of such a decision is that the employee ceases to meet the qualifications for his job and therefore becomes subject to removal. For example, in *Zimmerman* v. *Department of the Army,* 755 F.2d

156 (Fed. Cir. 1985), a civilian employee of the Army had challenged her removal resulting from her transfer out of her Army Reserve unit. The MSPB sustained the removal on the ground that after the transfer the employee no longer met the job specifications, but it declined to review the transfer on its merits. Affirming, the court of appeals said that the "Board does not have jurisdiction to examine military assignments and transfers" (*id.* at 157). Similarly, in *Buriani* v. *Department of the Air Force,* 777 F.2d 674, 677 (Fed. Cir. 1985), the court held that the Board could not examine the reasons for an Air Force Reserve officer's failure to be promoted, even though the nonpromotion caused the individual to be disqualified for, and therefore to be demoted from, his Air Force civilian position. See also *Tennessee* v. *Dunlap,* 426 U.S. 312 (1976) (affirming discharge of a National Guard employee whose job was conditioned on enlistment in the National Guard, without review of the allegedly arbitrary refusal of the National Guard to reenlist the employee in order to circumvent civil service protections). As the Board recognized here, these decisions "manifest a proper Board concern against treading into areas which are sensitive by virtue of their national security implications" (App., *infra,* 52a).[10]

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[10] The Board has also refused to question criminal convictions and bar decertifications that underlie agency adverse actions. See, *e.g.*, *Crofoot* v. *United States Government Printing Office,* 21 M.S.P.R. 248, 252 (1984), rev'd on other grounds, 761 F.2d 661 (Fed. Cir. 1985); *McGean* v. *NLRB,* 15 M.S.P.R. 49, 53 (1983). As the Board said in the present case, review of the underlying action was inappropriate because it was "committed to appropriate procedures within the respective entities and, additionally, involve[d] determinations wherein the Board lacks a specific grant of jurisdiction" (App., *infra,* 52a). See also *Bacon* v. *HUD,* 757 F.2d 265, 269 (Fed. Cir. 1985) ("the Supreme Court [in *United States* v. *Morgan*, 313 U.S. 409, 421-422 (1941)] has unequivocably drawn the line against inquiry into the mental process of an agency head").

The legislative history of the Civil Service Reform Act contains no indication that Congress intended to alter the understanding that denials of security clearances are not subject to substantive review. To the contrary, when the Senate and House committees listed the major changes wrought by the CSRA, they did not mention that agency security clearance determinations were now to be subject to review. See S. Rep. 95-969, 95th Cong., 2d Sess. 46 (1978); H.R. Rep. 95-1403, 95th Cong., 2d Sess. 21-22 (1978). In the absence of affirmative evidence of an intent to make such a dramatic change, the presumption (expressly suggested in the legislative history) is that the statute codified without change the federal employee appeal rights that had previously existed only by Executive Order.[11] Cf. *Heckler* v. *Chaney,* 470 U.S. 821, 832 (1985) (traditional commitment of decision to agency discretion prior to enactment of Administrative Procedure Act bears on whether APA review is appropriate).

The notion that Congress intended, without saying so expressly, to subject security clearance determinations to outside review on the merits, is all the more implausible because such decisions are inherently unsuitable for outside review. They are, as noted above, predictive in nature and inherently discretionary, requiring an affirmative determination by the reviewing official that he has high confidence in the employee. Such decisions "involve a complicated balancing of a number of factors which are peculiarly within [the agency's] expertise" (*Heckler* v. *Chaney*, 470 U.S. at 831). Security clearance determinations rest on the subjective judgment of those experienced in making predictions concerning risks to national security. They are, in this respect, much like the determination whether disclosure of particular information might compromise an intelligence source or method. Each decision "will often require complex political, historical, and psychological judgments," and the weighing of multiple factors requires the decisionmakers to "be familiar with 'the whole picture * * *.' " *CIA* v. *Sims*, 471 U.S. 159, 176, 179 (1985) (citation omitted). Thus, " ' "[w]hat may seem trivial to the uninformed, may appear of great moment to one who has a broad view of the scene and may put the questioned item of information in its proper context" ' " (*id.* at 178 (citations omitted)). See also *Halperin* v. *CIA*, 629 F.2d 144, 150 (D.C. Cir. 1980) (random bits of information "may aid in piecing together other bits of information even when the individual piece is not of obvious importance in itself"). Just as courts "are ill-equipped to become sufficiently steeped in foreign intelligence matters to serve effectively in the review of secrecy classifications in that area," *United States* v. *Marchetti*, 466 F.2d at 1318, so too are they ill-equipped to review the determinations of who may have access to such classified information. See *Greene* v. *McElroy*, 254 F.2d at 953; *Adams* v. *Laird*, 420 F.2d at 230. The decision, therefore, is one that is committed by "practical necessit[y]" to agency discretion and is inappropriate for outside review because there is, in effect, no law to apply. Cf. *CIA* v. *Sims*, 471 U.S. at 169; *Heckler* v. *Chaney*, 470 U.S. at 827-832.

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[11] See S. Rep. 95-969, 95th Cong., 2d Sess. 48 (1978) ("Subsection (a) [of 5 U.S.C. 7511] provides a statutory basis for the procedural protections and appeal rights now granted employees in the competitive service * * *. Protections against arbitrary or capricious actions have become established by practice and Executive Order – but not by statute – as a basic right of competitive service employees"; "Subparagraph (1)(B) of subsection (a) reaffirms procedural protections and appeal rights of preference eligibles in the excepted service"); *Civil Service Reform: Hearings Before the House Comm. on Post Office and Civil Service,* 95th Cong., 2d Sess. 13 (1978) (remarks of Alan K. Campbell, Chairman, U.S. Civil Service Commission) ("the protections [of the bill] in terms of the right to appeal from adverse actions remain[] not substantially changed from the current system").

Finally, the standard for MSPB review of removals, prescribed in 5 U.S.C. 7701(c)(1)(B), is so obviously inappropriate for review of the merits of security clearance determinations that Congress cannot have intended to require review under that section. Section 7701(c)(1)(B) provides that the agency's decision shall be sustained only if it is "supported by a preponderance of the evidence." But as Congress was well aware when it enacted that section,[12] a security clearance may only be *granted* if it is "clearly consistent with the interests of the national security." See Exec. Order No. 10,450, §§ 2, 7. The agency must make an affirmative determination, and all doubts are to be resolved against the granting of the clearance. It simply makes no sense to ask whether the *failure to grant* a clearance is supported by a preponderance of the evidence.[13]

At a different point in its opinion, the court of appeals (perhaps with some awareness of the implications of its holding) asserted that as an appellate authority the Board could not substitute its judgment for that of the agency. App., *infra*, 24a. But while seeking thus to give some measure of reassurance about what it was deciding, the court was forced to chop off the Board's head and feet to get it to fit the bed the court had made for it: the fact of the matter is that MSPB review of agency adverse personnel decisions under Section 7701 involves a full evidentiary hearing and de novo review of both factual and legal questions, and the agency is required to prove the propriety of its action by a preponderance of the evidence before the MSPB. See 5 U.S.C. 7701(a), (c)(1)(B), and (c)(2).[14] The fact that this procedure is obviously unsuited to review of the merits of security clearance determinations proves not that the court should redesign that procedure but that Congress could not have intended to subject the merits of security clearance determinations to Board review.

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[12] Executive Order No. 10,450 predated the enactment of the CSRA, and Congress itself adopted the standard in 1964 in expressly providing that all employment at the National Security Agency must be "clearly consistent with the national security." See Pub. L. No. 88-290, 78 Stat. 168 (codified at 50 U.S.C. 831).

[13] The fact that under 5 U.S.C. 7701(c)(1)(A) an agency may sustain a dismissal "based on unacceptable performance" merely by showing that the action was "supported by substantial evidence" makes it all the more unlikely that Congress intended that the denial of a security clearance be sustained only if "supported by a preponderance of the evidence" in accordance with 5 U.S.C. 7701(c)(1)(B). See also S. Conf. Rep. 95-1272, 95th Cong., 2d Sess. 139 (1978) (5 U.S.C. 7701(c)(1)(A) provides for a "lower standard of proof * * * because of the difficulty of proving that an employee's performance is unacceptable"). But if security clearance determinations are reviewable on the merits at all, "preponderance" is clearly the prescribed standard.

3. Section 7532 provides that "the head of an agency" may remove an employee "when he determines that removal is necessary or advisable in the interests of national security" (5 U.S.C. 7532 (b) and (c)). Such a removal is not subject to MSPB review (see 5 U.S.C. 7512(A)). The court of appeals found the availability of the Section 7532 procedure a "compelling" (App., *infra*, 18a) argument in favor of MSPB review of the denial of a security clearance in any removal case where the Section 7532 procedure is not followed. This is a non sequitur.

Section 7532 is a drastic remedy, not appropriate for every denial of a security clearance, and the court of appeals expressly recognized (App., *infra*, 12a) that an agency may remove an employee for cause, for failing to obtain a required security clearance, without invoking Section 7532. Section 7532 requires an affirmative determination, by the head of the agency,[15] that the *removal* is in the interests of national security; once that determination has been made, the removal is not subject to *any* outside review. By contrast, a security clearance may be granted only if the agency is able to make an affirmative determination that the *grant of a clearance* is "clearly consistent with the interests of national security" (compare OPNAVINST 5510.1F, para. 16-100(1a) with para. 16-100(1b) (C.A. App. 26)). But a removal, based on the agency's inability to make such a finding, is subject to MSPB review that provides important protections: it affords the employee an outside check on whether the agency afforded him procedural due process, including notice, a statement of reasons for the denial, and an opportunity to respond.[16] The question here is whether that outside review should also include the substance of the underlying security clearance determination; Section 7532 has no bearing on that question except as it demonstrates Congress's awareness that determinations based on national security considerations are not appropriate for outside review.

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[14] For the period just prior to the Board's decision in this case, presiding officials of the Board believed that they had authority to substitute their judgment in security clearance matters for that of the agency, even to the point of ordering agencies to grant or reinstate clearances. See *Skees* v. *Department of the Navy*, No. PHO7528410257 (M.S.P.B. June 14, 1984), slip op. 13; *Peterson* v. *Department of the Navy*, No. BNO7528410010 (M.S.P.B. Feb. 14, 1984), slip op. 8; *Irving* v. *Department of the Navy*, No. BNO7528410005 (M.S.P.B. Feb. 3, 1984), slip op. 9.

The decision of the presiding official in this case is illustrative. The factual allegations on which the denial of respondent's security clearance was based were evidenced by law enforcement and judicial records and were not disputed. Nevertheless, the presiding official ruled, in essence, that the Navy had not satisfied *her*, by a preponderance of the evidence, that the determination that those undisputed facts warranted the denial of a security clearance was "reasonable." App., *infra*, 64a-66a. Such an approach to the question would be appropriate only if the CSRA had, without expressly saying so, changed both the standard for granting security clearances and the identity of the decisionmaker.

[15] Navy regulations interpret Section 7532 as requiring that the service Secretary personally make the determination to remove an employee under that section. OPNAVINST 5510.1G, para. 22-6(2) (Apr. 20, 1984). The Department of the Navy advises that it alone will deny or revoke approximately 200 civilian employee or applicant clearances this year.

4. The court of appeals' decision warrants this Court's review for three reasons.

First, it appears to be the dispositive court of appeals consideration of this issue. This case was the test case on the issue at the MSPB, and all interested agencies and other persons were formally invited to participate in filing briefs. Decisions of the MSPB on review of adverse personnel actions are subject to review at the request of the government only in the Federal Circuit (see 5 U.S.C. 7703(d)). The same is true, with limited exceptions, for review at the request of the employee (see 5 U.S.C. 7703(b)); obviously, no employee with a choice would be well advised to pursue this issue in a different circuit.

Second, national security interests are directly involved, not only because MSPB second-guessing will lead to poorer clearance decisions but also because, as the Board noted (App., *infra*, 52a-53a), the process of MSPB review of security clearance determinations would itself threaten the disclosure of classified information.[17] Even where

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[16] In addition, in non-Section 7532 cases, the MSPB considers questions relating to the removal itself, such as whether the employee is entitled to reassignment to a nonsensitive position at the same agency or facility. The MSPB has no such jurisdiction in respect to a Section 7532 removal.

[17] Indeed, the Court has gone so far as to say that " 'public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential, and respecting which it will not allow the

litigation protections for particular information can be devised, albeit at a cost to adversarial proceedings (see, *e.g.*, *Molerio* v. *FBI*, 749 F.2d 815 (D.C. Cir. 1984) (state secrets privilege)), there remains a considerable risk that the integrity of personnel security programs may be compromised. For example, when an agency must explain, in case after case, how or why certain factors compelled the revocation or denial of a security clearance, it inevitably will be painting a rather clear picture to hostile entities of the factors that are of concern in security determinations, and thus will increase their ability to penetrate our military and intelligence agencies undetected. Cf. *CIA* v. *Sims*, 471 U.S. at 179 ("It is conceivable that the mere explanation of why information must be withheld can convey valuable information to a foreign intelligence agency"); *Doe* v. *Casey*, 796 F.2d 1508, 1532 (D.C. Cir. 1986) (Buckley, J., dissenting) ("To intrude however deferentially into the [CIA's] most sensitive personnel decisions entails the inevitable risk of unwittingly compromising national intelligence operations through the forced disclosure of information whose possible significance a court is not capable of assessing"), petition for cert. pending, No. 86-1294.

Third, the issue can be expected to arise in a large number of MSPB proceedings, each of which is in turn subject to judicial review. The Department of the Navy has advised us that it alone will deny or revoke approximately 200 civilian employee or applicant clearances this year. Other branches of the armed services and civilian agencies with sensitive positions will also deny or revoke clearances. While only some of these denials or revocations will lead to adverse personnel actions against em-

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confidence to be violated.' " *Weinberger* v. *Catholic Action of Hawaii/Peace Education Project*, 454 U.S. 139, 146-147 (1981) (quoting *Totten* v. *United States*, 92 U.S. 105, 107 (1875)).

ployees entitled to MSPB review, see generally 5 U.S.C. 7511, it is clear that if the decision below is allowed to stand the potential number of occasions for MSPB review on the merits of security clearance determinations is quite large.[18]

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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[18] The court of appeals' decision, moreover, is damaging precedent, and will be cited by other tribunals in analogous cases. It has already been followed by the Foreign Service Grievance Board (see 22 U.S.C. 4135 *et seq.*) in *Krc* v. *USIA*, No. G-85-012-USIA-1 (Mar. 19, 1987) (ordering employee reinstated to previous position because agency had insufficient reason to deny him a security clearance). It will undoubtedly be looked to by other courts—as the court of appeals here looked to *Hoska* v. *Department of the Army*, *supra*—and by arbitrators as well (see 5 U.S.C. 7121(f)).

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

Appeal No. 86-579
MSPB Docket No. SE07528310257

THOMAS E. EGAN, PETITIONER,

v.

DEPARTMENT OF THE NAVY, RESPONDENT.

DECIDED: October 1, 1986

Before MARKEY, *Chief Judge*, NEWMAN, *Circuit Judge*, and SWYGERT, *Senior Circuit Judge.*[*]

NEWMAN, *Circuit Judge*.

Thomas E. Egan seeks review of a final decision of the Merit Systems Protection Board ("Board"), sustaining his removal from employment by the Department of the Navy ("agency"). *Egan v. Department of the Navy*, 28 M.S.P.R. 509 (1985). We vacate the Board's decision and remand for further proceedings.

BACKGROUND

Mr. Egan was appointed to a Veterans Readjustment Appointment effective November 29, 1981 as a laborer, WG-3502-03, at the Trident Naval Refit Facility in Bremerton, Washington. A condition precedent to the retention of his employment was "satisfactory completion of security and medical reports", as shown on his Standard Form (SF)-50. A National Agency Check Investigation was initiated at the time of Mr. Egan's appointment. Mr. Egan was thereafter assigned to the "noncritical-sensitive"[1] position of laborer leader, WL-3502-03, on April 18, 1982.

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[*] The Honorable Luther M. Swygert, Senior Circuit Judge, United States Court of Appeals for the Seventh Circuit, sitting by designation. 28 U.S.C. § 291 (1982).

On February 16, 1983 the Director of Naval Civilian Personnel Command issued a notice of the agency's intention to "deny/revoke" Mr. Egan's security clearance. The notice stated that agency regulations

> require[] this Command to adjudicate information on civilian personnel to determine their eligibility for a security clearance and/or assignment to sensitive duties. A determination is based on the individual's loyalty, reliability, trust worthiness, and judgment. Information contained in personal security investigations and from other relevant sources is used in making the determination.

The notice also stated that "[i]f a final adverse security determination is made by this Command, an individual will not be assigned to sensitive duties", and that Mr. Egan's access to classified information was suspended until a final determination was made.

The stated reason for this action was the existence of various California and Washington state criminal records showing, *inter alia*, Mr. Egan's convictions for second degree assault and for being a felon in possession of a pistol. The agency stated that Mr. Egan had failed to list, on his Personnel Qualifications Statement (SF-171) of September 7, 1981, two previous convictions for carrying a loaded firearm. The agency also referred to Mr. Egan's sworn statement of August 5, 1982 concerning his past drinking habits, and to the fact that he had spent the final twenty-eight days of one sentence at an alcohol rehabilitation program.

Mr. Egan was given an opportunity to reply in writing "to explain, mitigate or refute" the stated reasons for the action. Mr. Egan's designated representative Richard A. Brown, President of the International Association of Machinists Nipsic Lodge No. 282, provided a written reply dated May 6, 1983. In brief, this reply stated that Mr. Egan did not list certain of the charges referred to by the agency because he had not been found guilty of the charges, because they had been dismissed, or because they had occurred outside of the seven year time period designated in the employment application. The reply stated that the two convictions within the last seven years were listed in his application and that Mr. Egan's debt to society for these offenses had been paid in full. In addition to explaining the factual circumstances of some of the charges, the reply stated that alcohol had not been a problem for Mr. Egan for more than three years. The reply included favorable statements from Mr. Egan's supervisors as to his background and character.

On May 27, 1983 the Director of Naval Civilian Personnel Command issued its final determination:

> [2.] The information provided by you does not sufficiently explain, mitigate, or refute the reason(s) on which the intended denial/revocation action is based. Accordingly, your security clearance is denied/revoked effective today. As a result of this determination, you are not eligible to occupy a sensitive position with the Department of the Navy.
>
> 3. The activity head will annotate your OPNAV Form 5520/20 (Certificate of Personnel Security Investigation, Clearance and Access). . . .

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[1] "Noncritical-sensitive" positions are defined by the agency to include positions involving "[a]ccess to Secret or Confidential information". OPNAVINST 5510.1F, paragraph 16-101.2.6.

On June 17, 1983 the agency issued a notice of proposed removal "for failure to meet the requirements of your position due to denial of your security clearance". The notice stated that his position required "a security clearance due to access to classified information regarding arrival/departure of submarines and access to classified/restricted areas of equipment aboard the submarines" and that maintenance of a security clearance was a mandatory condition of employment "necessary to ensure the security of classified defense information from potential espionage efforts by hostile foreign powers". Reassignment to a nonsensitive position was not feasible at the facility.

Mr. Egan did not respond orally or in writing to the notice of proposed removal, and on July 15, 1983 the agency issued its final decision to remove Mr. Egan.

Mr. Egan filed a timely appeal to the Board. On December 22, 1983, the presiding official reversed the agency's decision. The presiding official reviewed the standards for evaluating an agency's denial of an employee's security clearance:

> As a logical first step the agency must initially establish the standard for obtaining a security clearance by showing the specific criteria used to determine whether to deny, grant, or revoke the security clearance. Additionally, in order to avoid arbitrary or perfunctory decisions, it must show that these criteria are rationally related with those concerns connected with our national security. *See Schwartz v. United States Department of the Army*, [16 M.S.P.R. 642 (1983)], citing *Hoska [v. United States Department of the Army*, 677 F.2d 131, 138 (D.C. Cir. 1982)]. Any subsequent investigation of an employee should be evaluated within the framework of these criteria. As a result of its investigation an agency must be able to show how an employee's alleged misconduct has an actual or potentially detrimental effect on national security interests. The final decision made on the basis of such an evaluation must be "reasonable and warranted." *Schwartz*, [16 M.S.P.R. at 644].

Applying these standards, the presiding official stated that it was "impossible" to determine whether the agency's decision was "reasonable" because the agency failed to "establish what specific criteria are used to determine whether to deny, grant, or revoke an employee's security clearance, or to prove that such criteria are rationally related to our national security". Despite warnings by the presiding official concerning deficiencies in the evidence and the agency's burden of proof, the agency had elected to rely solely on the conclusory statements in its letters of proposed and final denial of clearance and on the allegations in its brief, unsubstantiated by evidence.

The presiding official also held that the agency "failed to present any evidence showing it conscientiously weighed the circumstances surrounding appellant's alleged misconduct and reasonably balanced it against the interests of national security", including whether Mr. Egan actually concealed prior offenses on his SF-171, whether offenses for which Mr. Egan had been arrested but subsequently found not guilty had been considered as proof of his misbehavior, and whether the statements from Mr. Egan's supervisors had been considered.

The agency petitioned for review of the presiding official's decision by (1) challenging the Board's authority to review the merits of a security clearance denial; (2) alleging error in the presiding official's assessment of the evidence submitted; and (3) assuming *arguendo* that the Board had authority to review the merits of the denial and that the agency had failed to meet its burden of proof, contending that the appropriate remedy was not to reverse the removal but to remand the case to the agency to correct any errors. *Egan*, 28 M.S.P.R. at 512.

The Board, having before it numerous petitions for review containing issues of law common to those in *Egan*, solicited *amicus* briefs on issues (1) and (3) above, 49 Fed. Reg. 48,623-24 (1984), and on the following supplemental question:

> C. When an agency wishes to base an action listed in 5 U.S.C. 7512 on the revocation of security clearance, may it do so pursuant to 5 U.S.C. 7513, or is 5 U.S.C. 7532 the exclusive basis for such an action?

50 Fed. Reg. 2,355 (1985).

Twelve *amici* filed briefs. The Board treated *Egan* as the lead case concerning the Board's authority in security clearance cases. After discussing the statutory framework, the relevant case law, and the arguments and policy considerations raised by the parties and the *amici*, the Board rejected its previous decision in *Bogdanowicz v. Department of the Army*, 16 M.S.P.R. 653 (1983), which in turn implemented the D.C. Circuit's decision in *Hoska v. United States Department of the Army*, 677 F.2d 131 (D.C. Cir. 1982). The Board decided:

> [I]n an adverse action over which the Board has jurisdiction and which is based substantially on the agency's revocation or denial of a security clearance, the Board has no authority to review the agency's stated reasons for the security clearance determination. However, the Board will review the procedures utilized by the agency to ensure that the agency afforded the appellant procedural due process.

Egan, 28 M.S.P.R. at 519. The Board continued:

> We further hold that the minimal due process rights that must be afforded the employee upon the agency's denial or revocation of a security clearance are: notice

> of the denial or revocation; a statement of the reason(s) upon which the negative decision was based; and an opportunity to respond.
>
> The nature of Board review in such cases, therefore, will be limited to determining that the agency has established the following: (1) the requirement of a security clearance for the position in question; (2) the loss or denial of the security clearance; (3) and the granting of minimal due process protections to the employee.

Id. at 519-20.

The Board held that it "has no authority to order reinstatement of a security clearance", that 5 U.S.C. § 7532 "is not the exclusive basis for removals based upon security clearance revocations", and that the appropriate remedy if the Board finds that the agency failed to afford an appellant procedural due process rights is to "reverse the adverse action and to order the agency to restore the appellant to pay statute". *Id.* at 520-21. However, in such case the agency may reinitiate the removal action after providing the employee minimal due process protection. *Id.* at 522.

Applying this new standard to the facts of Mr. Egan's case, the Board held that the presiding official erred in reviewing the merits of the agency's denial of Mr. Egan's security clearance. As the agency had shown that a security clearance was required for Mr. Egan's position, that his removal was based on the agency's denial of his security clearance, and that he had received the minimal due process of notice and an opportunity to respond before the agency, the Board reversed the presiding official and sustained the agency's removal action. *Id.* at 522-23. The Board did not address the agency's remaining allegations of error committed by the presiding official.

The Board has applied the *Egan* standard in subsequent cases wherein an agency denied or revoked an employee's security clearance, the Board refusing to review the merits of the agency's action. Several of these cases are on appeal to this court and have been stayed pending resolution of this appeal. The petitioner in one such appeal, *Bogdanowicz v. Department of the Army*, Appeal No. 86-510, has filed an *amicus* brief in this court.

Analysis

I.

Review of the Board's decision starts with the statutes defining the Board's authority.

The Board is required to "hear, adjudicate, or provide for the hearing or adjudication, of all matters within the jurisdiction of the Board". 5 U.S.C. § 1205(a)(1). In 5 U.S.C. §§ 7512(1) and 7513(d) Congress assigned the Board appellate review of removal actions taken against "employees" pursuant to subchapter II of Chapter 75.

The statute provides in 5 U.S.C. § 7532 for the exclusion from Board review of agency actions against employees in national security matters, and establishes a procedure for such actions. Mr. Egan's removal was not taken under that provision. The statute provides no exclusion from Board review of removals under 5 U.S.C. § 7513(a), the provision under which Mr. Egan was removed on the ground of failure to receive a job-required security clearance. We have found no indication in the legislative history of the Civil Service Reform Act that such a removal action if taken under § 7513(a) was intended to be exempt from Board review, and the government has not asserted that Congress so intended.

Section 7532 of Chapter 75 provides an alternative mechanism, expressly excluded by 5 U.S.C. § 7512(A) from appellate review by the Board, for suspension and

removal of an employee in the interest of national security. This procedure was available to the Department of the Navy. *See* 5 U.S.C. §§ 102, 7531(5). The legislative history of 5 U.S.C. § 7512 states that "[a]dditional exceptions conforming this section to other provisions in title V cover employees subject to section 7532 (national security)" as well as other categories of employees. S. Rep. No. 969, 95th Cong., 2d Sess. 50, *reprinted in* 1978 U.S. Code Cong. & Ad. News 2723, 2772. The Board does not state that Mr. Egan is in any excluded category.[2]

An employee removed in the interest of national security by application of section 7532 is entitled to certain procedures within the agency, including a hearing at the employee's request and review by the head of the agency or his designee. The determination of the head of the agency is final and is not reviewable by the Board. The basic procedures are set out in the statute:

> § 7532. Suspension and removal
>
> (a) Notwithstanding other statutes, the head of an agency may suspend without pay an employee when he considers that action necessary in the interests of national security. To the extent that the head of the agency determines that the interests of national security permit, the suspended employee shall be notified of the reasons for the suspension. Within 30 days after the notification, the suspended employee is

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[2] The person who has been denied a security clearance must be an "employee" as defined by 5 U.S.C. § 7511(a)(1). This excludes, *inter alia*, probationary employees and non-preference eligibles in the excepted service, employees in the Federal Bureau of Investigation, 28 U.S.C. § 536, and members of the uniformed services, 5 U.S.C. §§ 2101-02. Civilian personnel in the Defense Intelligence Agency, Central Intelligence Agency, and the National Security Agency can be exempt from the procedural rights granted under 5 U.S.C. § 7513 pursuant to statute. *See* 5 U.S.C. § 2302(a)(2)(C)(ii); 10 U.S.C. § 1604(e)(1); 50 U.S.C. §§ 403(c), 833(a).

entitled to submit to the official designated by the head of the agency statements or affidavits to show why he should be restored to duty.

(b) Subject to subsection (c) of this section, the head of an agency may remove an employee suspended under subsection (a) of this section when, after such investigation and review as he considers necessary, he determines that removal is necessary or advisable in the interests of national security. The determination of the head of the agency is final.

(c) An employee suspended under subsection (a) of this section who—

(1) has a permanent or indefinite appointment;

(2) has completed his probationary or trial period; and

(3) is a citizen of the United States; is entitled, after suspension and before removal to—

(A) a written statement of the charges against him within 30 days after suspension, which may be amended within 30 days thereafter and which shall be stated as specifically as security considerations permit;

(B) an opportunity within 30 days thereafter, plus an additional 30 days if the charges are amended, to answer the charges and submit affidavits;

(C) a hearing, at the request of the employee, by an agency authority duly constituted for this purpose;

(D) a review of his case by the head of the agency or his designee, before a decision adverse to the employee is made final; and

(E) a written statement of the decision of the head of the agency.

The Supreme Court stated in *Cole v. Young*, 351 U.S. 536, 551 (1956), that an employee can be dismissed under this section (its text was substantially identical under the predecessor Civil Service Act) only if he or she occupies a "sensitive" position and the agency head determines that the position "is one affected with the 'national security.' " *Id.*

Mr. Egan's position was classified as "noncritical-sensitive". The letter of proposed removal stated that Mr. Egan's removal for failure to qualify for a security clearance was "necessary to ensure the security of classified defense information from potential espionage efforts by hostile foreign powers". *See Cole*, 351 U.S. at 544 ("national security" is intended to cover "only those activities of the Government that are directly concerned with the protection of the Nation from internal subversion or foreign aggression"). The agency does not argue that it could not have removed Mr. Egan pursuant to the provisions of 5 U.S.C. § 7532, and thereby have avoided Board review.

The agency chose, however, to remove Mr. Egan pursuant to 5 U.S.C. § 7512. We therefore reach the basic question raised by the Board, i.e., whether 5 U.S.C. § 7532 is the exclusive basis for removal based on national security grounds. *We conclude, as did the Board, that it is not.*

There is nothing in the text of section 7532 or its legislative history to suggest that its procedures were intended to preempt section 7513 procedures whenever the removal could be taken under section 7532. The language of section 7532 is permissive, stating that the head of the agency "may" suspend and remove an employee under that section. The Court in *Cole* recognized that employees under the Lloyd-LaFollette and Veterans' Preference Acts could be dismissed on loyalty grounds without proceeding under the earlier counterpart to section 7532. *Cole*, 351 U.S. at 543-44.

We conclude that Congress intended to provide the agencies with procedural flexibility in effecting the removal of government employees on national security grounds, and that such removal may be brought under either section 7512 or section 7532. The agency is responsible for selecting the removal procedure in the particular circumstance. Each procedure will entail different benefits and burdens for both the agency and the employee.

Having chosen to remove Mr. Egan under section 7512 rather than section 7532, the agency has chosen the procedure that carries Board review under section 7513.[3] We thus turn to the questions of the scope and standard of the Board's review.

II.

The Board held that it had no authority to review the agency's reasons for the security clearance determination. The Board held that it did have authority to review the procedures utilized by the agency, to the limited extent appropriate to determine whether the agency afforded Mr. Egan "minimal due process", as this was defined by the Board. *Egan*, 28 M.S.P.R. at 519-20.

We have been directed to no statutory support for this new procedure. We agree that the Board is responsible for ensuring that an employee receives due process; however, the Board is also responsible for conducting, not abdicating, its other statutory responsibilities. This includes,

absent contrary congressional authorization, the obligation under 5 U.S.C. § 7701 to review agency actions taken under subchapter II of Chapter 75.

5 U.S.C. § 7701(c)(1)(B) provides that the Board will determine whether the agency's decision is supported by a preponderance of the evidence. Section 7701 contains no exception from such review if the decision is based upon denial of security clearance; unless, of course, the decision is made by the agency under section 7532. The absence of any statutory provision precluding appellate review of security clearance denials in section 7512 removals creates a strong presumption in favor of appellate review. *See Abbott Laboratories v. Gardner*, 387 U.S. 136, 141 (1967) ("only upon a showing of 'clear and convincing evidence' of a contrary legislative intent should courts restrict access to judicial review").

In *Hoska v. United States Department of the Army*, 677 F.2d 131 (D.C. Cir. 1982), that court reviewed on its merits a Board decision based on its full review of the agency's revocation of the petitioner's security clearance, where the Board had itself reviewed the agency's decision and held that the removal was supported by a preponderance of the evidence. The D.C. Circuit held that the evidence presented was inadequate to support the decision and remanded the case with instructions to order appropriate relief, including reinstatement, backpay, and reissuance of the petitioner's security clearance. The Board now repudiates *Hoska*, and its own precedent, not on the merits but on the procedural ground that the D.C. Circuit did not "expressly address the Board's authority to review the underlying reasons for the agency's security clearance determination", and also that that opinion is not binding upon the Board. *Egan*, 28 M.S.P.R. at 516 & n.4.

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[3] It is not material, as the dissent argues, that Mr. Egan could have sought review within the Navy as provided by OPNAVINST 5510.1F, paragraph 16-105.1.d. Mr. Egan still had the right to appeal his removal to the Board as set forth in 5 U.S.C. § 7513.

The Board, discussing its "misplaced" reliance on *Hoska*, stated:

> [T]he Board . . . would inevitably be faced with agency exposition of highly sensitive materials and Board determinations on matters of national security. We find that the underlying national security considerations inherent in a security clearance determination involve such a degree of sensitivity that we should not infer jurisdiction over that determination, particularly in light of Executive Order 10450, which commits such actions to agency discretion.

Egan, 28 M.S.P.R. at 518 (footnote omitted). Exec. Order No. 10,450, 3 C.F.R. 936 (1953), *reprinted as amended in* 5 U.S.C. § 7311 note, provides in section 2 that:

> The head of each department . . . shall be responsible for establishing and maintaining . . . an effective program to insure that the employment and retention in employment of any civilian officer or employee within the department . . . is clearly consistent with the interests of national security.

The Executive Order does not address appellate review of an agency's grant or denial of security clearance, although it discusses the factors to be weighed to determine whether a person's employment is consistent with the interests of national security. *Id.* at § 8. The Executive Order establishes responsibilities within the executive branch, and is entirely consistent with the civil service laws before us. It does not purport to preclude the application of these laws.[4]

The Board observed in *Egan* that it generally "has the authority to review the merits of the case, including the merits of the underlying reasons upon which the adverse action is based". *Egan*, 28 M.S.P.R. at 517 n.5. Matters of agency administrative discretion have not been immune from Board review. For example, in *Ketterer v. U.S. Department of Agriculture*, 2 M.S.P.R. 294 (1980), the Board held that it would review the agency's basis for a reassignment where the employee's refusal to accept reassignment resulted in his removal. In *Bavier v. Department of Transportation*, 4 M.S.P.R. 548 (1981), the Board held that the agency must show the propriety of its decision to deny leave to sustain its charge of absence without leave. In *Huber v. Merit Systems Protection Board*, 793 F.2d 284 (Fed. Cir. 1986), the Board reviewed the agency's denomination of its action as a reduction in force for jurisdictional and relief purposes. *See also Losure v. Interstate Commerce Commission*, 2 M.S.P.R. 195 (1980). In *Brewer v. American Battle Monuments Commission*, 779 F.2d 663 (Fed. Cir. 1985), this court held that the Board had authority to review a reassignment that accompanied a reduction in grade. All of these cases involve Board review of intrinsically agency-committed discretionary decisions.

The Board correctly states that there are some actions that it is restrained from reviewing on the underlying merits, namely military assignments, criminal convictions, and bar decertifications.

In *Zimmerman v. Department of the Army*, 755 F.2d 156, 157 (Fed. Cir. 1985), this court affirmed that "the Board does not have the jurisdiction to examine military assignments and transfers." In *Buriani v. Department of*

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[4] Although the dissent states that the Executive Order removed security matters from the civil service laws, by analogy to the military who (by statute) are not covered by the civil service laws, we observe that they coexisted in harmony from 1953 to 1985. The Executive Order instructs agency heads to establish and administer a security program; the civil service laws establish statutory procedures for removal of employees. Indeed, 5 U.S.C. § 7532, specific to removal of employees in the interest of national security, has its origin in law enacted in 1950. It is a truism that the Executive can not by Order vacate an Act of Congress.

the Air Force, 777 F.2d 674, 677 (Fed. Cir. 1985), we held that the Board could not review an Air Force refusal to promote a member of the Air Force Reserves, although failure to attain promotion resulted in the loss of active reserve membership, a condition of the employee's civilian employment. *Zimmerman* and *Buriani* turn on the long-established premise that "[t]he military constitutes a specialized community governed by a separate discipline from that of the civilian" and that it is not the role of the judiciary to intervene in the orderly execution of military affairs. *Orloff v. Willoughby*, 345 U.S. 83, 94 (1953). The civil service laws do not cover military service, see 5 U.S.C. §§ 2101-02; these decisions affirming that restraint do not control Mr. Egan's situation. Mr. Egan was not a member of the military forces, nor was he a dual status employee in the active reserves. The reasons for refraining from judicial review exemplified in *Zimmerman* and *Buriani* are not here present.

Security clearances of course are not limited to employees in the military departments; other agencies such as the Department of Commerce or the Department of Energy may also require such clearance. Neither the Executive Order nor the statutes draws a distinction between civilian employees of military and non-military agencies, and it is apparent from the panoply of laws and regulations that such distinction was not intended. Even in the military context, in *Mindes v. Seaman*, 453 F.2d 197, 201 (5th Cir. 1971), a case heavily relied on by the Board and the agency, the court in referring to the policy of nonreview of military matters recognized that internal military affairs could be reviewed by the courts upon allegation of the deprivation of a constitutional right or that the military had acted in violation of applicable statutes and regulations, after exhaustion of available intraservice corrective measures.

The Board also relies on cases relating to criminal convictions and bar decertification, where it refused to allow collateral attack on those underlying reasons for the agency's adverse action. *See, e.g., Crofoot v. United States Government Printing Office*, 21 M.S.P.R. 248, 252 (1984), *rev'd on other grounds*, 761 F.2d 661 (Fed. Cir. 1985) (Board does not examine reasons behind criminal conviction to determine guilt or innocence); *McGean v. National Labor Relations Board*, 15 M.S.P.R. 49, 53 (1983) (Board does not examine reasons for bar decertification where employee is removed for failure to maintain bar membership). These decisions are distinguished on the simple ground that they relate to collateral attack on the decisions on other tribunals. The criminal conviction in *Crofoot* and the bar decertification in *McGean* were not federal agency actions; they were actions of entirely separate regulation or enforcement, in which the agency removing the employee had no role.

A person can obtain review of the underlying facts pertinent to criminal conviction or loss of bar certification by appropriate judicial process. In Mr. Egan's case, as decided by the Board, the agency that removed him achieves a complete absence of appellate review of the underlying facts by any tribunal at all, merely by referring to the national security, whether or not that is a supportable reason for the removal.

It is apparent that where national security considerations are involved, safeguards of sensitive information, if sensitive information is critical to the case, may be required in reviewing the agency's decision. But overstatement infects the Board's position that "it would inevitably be faced with agency exposition of highly sensitive materials". *Egan*, 28 M.S.P.R. at 518. No such materials were asserted in Mr. Egan's appeal before the presiding official. The Board's decision to refrain from review of all such actions taken under 5 U.S.C. § 7512 does not distinguish between sensitive and nonsensitive cases. We consider it of compelling weight that, if sensitive information is involved in the case, the agency has available the procedures of 5 U.S.C. § 7532 and the avoidance of all non-agency review.

Mr. Egan was not removed for national security reasons under section 7532 but for cause under section 7512. The basis for the agency's adverse determination as to his "loyalty, reliability, trustworthiness, and judgment" was not "unknown and unknowable", as the agency now claims, but was pursuant to specific criteria in the agency's own regulations, *viz.*:

> h. Criminal or dishonest conduct.
>
> i. Deliberate false statement, deception or fraud in applying for enlistment or appointment or in providing information in connection with a security clearance or assignment to a sensitive position.
>
> j. Habitual or episodic use of intoxicating beverages to excess.
>
> k. Abuse of, or addition to, narcotics, drugs, or other controlled substances.
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> * * *
>
> m. Any facts, circumstances, or conduct that indicates poor judgment, unreliability, or untrustworthiness, thereby suggesting that the person concerned might fail to safeguard classified information, deliberately or inadvertently, or may not be suitable for assignment to sensitive duties.
>
> * * *
>
> p. Refusal or intentional failure to provide material facts in a personal history statement or security form. . . .

OPNAVINST 5510.1F, paragraph 16-102.2 As in *Hoska*, 677 F.2d at 136, the agency's security determination was designed to be "an overall, commonsense determination

based on all available information". OPNAVINST 5510.1F, paragraph 96-102.1. There is no dearth of agency regulation, rule, or guideline for security determinations; and in Mr. Egan's case he was informed in lengthy detail of the reasons why his clearance was denied. As demonstrated in ***Bogdanowicz, supra***, the Board is capable of reviewing the record to decide if the agency has established by appropriate standard that the employee should be denied security clearance.

Similarly, the Board's determination of a nexus between the criteria set out in the agency's regulations and the employee's ability to safeguard classified information is not unlike other nexus determinations. The Board has upheld the removal of employees found to have falsified employment applications or to have criminal or alcoholism records, in many contexts in addition to that of national security. The statute and regulations require the Board to review adverse actions, except for those taken under 5 U.S.C. § 7532, for the purpose of promoting the efficiency of the service. It is incongruous to assert, as does the dissent, that the Board is incapable of reviewing an agency's decision based on loyalty, trustworthiness or veracity, and therefore that the intent of Congress in enacting both § 7512 and § 7532 must be ignored.

In sum, the Board is required to review the agency action taken against Mr. Egan with the same full process and standards and scope of review, established by law and precedent, as any other adverse action taken under section 7512.

III.

The Board's decision in *Egan* creates the anomalous situation whereby employees removed for national security reasons under 5 U.S.C. § 7512 would be entitled to less process than those removed under 5 U.S.C. § 7532. As discussed above, employees removed under section 7532, although denied Board review, are entitled to a full evidentiary hearing within the agency. Under the Board's decision, Mr. Egan would be given only a written right of reply and neither an agency hearing nor a right of review by the Board on the merits. Mr. Egan and those similarly situated would lose their statutory right to both a hearing and a review of the merits of the agency action if the agency elects removal under section 7512.

The procedure designed by the Board, which the Board characterizes as "minimum due process", is a departure from the Civil Service Reform Act's careful balance of employer and employee interests. This procedure would evict a large class of federal employees from the statutory safeguards that this Act provides. Minimim due process under this Act requires not only minimal pre-termination procedures, *see Mercer v. Department of Health and Human Services*, 772 F.2d 856 (Fed. Cir. 1985), but also requires a post-termination hearing as provided in 5 U.S.C. § 7701(a)(1). As discussed in *Arnett v. Kennedy*, 416 U.S. 134 (1974), federal employee due process requires a full evidentiary hearing at some point in the termination proceedings, if not before removal, then after. *See also Cleveland Board of Education v. Loudermill*, 105 S. Ct. 1487, 1496 (1985). The *Arnett* Court stated that an employee's "liberty" interest in removing "any wrongful stigma from his reputation" may be offended by dismissal based on an unsupported charge:

> Since the purpose of the hearing in such a case is to provide the person "an opportunity to clear his name," a hearing afforded by administrative appeal procedures after the actual dismissal is a sufficent compliance with the requirements of the Due Process Clause.

416 U.S. at 157 (plurality opinion).[5]

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[5] Justices Powell and Blackmun concurred on this point. 416 U.S. at 170. Justice White dissented in part due to the agency's failure to

This right to a hearing is particularly cogent in the security clearance context. In Mr. Egan's case, the agency's regulations provided that "[f]inal adverse personnel security actions based on Defense Investigative Service (DIS) investigations shall be reported to DIS for recording in the Defense Central Index of Investigations. . . ." OPNAVINST 5510.1F, paragraph 16-105.6. This record will make it difficult, perhaps impossible, for Mr. Egan to obtain further government employment. *See* 5 C.F.R. § 732.401. Unlike the situation in *NeSmith v. Fulton*, 615 F.2d 196, 200 n.6 (5th Cir. 1980), discussed by the dissent, the information is not in the Navy's private files but in a separate (DIS) file made available to OPM and other agencies upon request. This information will also be used if Mr. Egan seeks employment requiring security clearance in the private sector, under the Department of Defense Industrial Personnel Security Clearance Program. *See generally*, 32 C.F.R. Parts 155-56, 361.

Not in point is *Cafeteria & Restaurant Workers Union, Local 473, AFL-CIO v. McElroy*, 367 U.S. 886 (1961), cited by the dissent, where the person involved was not a government employee, and was therefore not entitled to the statutory rights of government employees as set out in Title 5. The Court stated that this was "not a case where government action [exclusion from the premises] has operated to bestow a badge of disloyalty or infamy, with attendant foreclosure from other employment opportunity." *Id.* at 898. The Court also observed that no one had accused the petitioner of being "disloyal". *Id.* at 898-99. The same cannot be said for Mr. Egan.

Although the dissent justifies Mr. Egan's removal without either a pre-termination or post-termination hearing, on a catalog of Mr. Egan's alleged transgressions, the

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provide an impartial hearing officer at the pretermination hearing, but he agreed that the full trial-type hearing need not occur prior to the employee's termination. *Id.* at 185-86, 200-202.

merits have not yet been reviewed by the Board, and are not before us. The facts of Mr. Egan's case may indeed lead the Board to affirm the agency's action. That decision has not yet been made.

The Board, by refusing to review an agency's reasons for refusal of security clearance, denies to those federal employees the minimal opportunity to correct agency error, or to be protected from specious, arbitrary, or discriminatory actions.[6] The Board thus violates the congressional mandate that it "protect the rights of employees, recognized by the Supreme Court in *Arnett v. Kennedy*, 416 U.S. 134 (1974), to a full and fair consideration of their case". S. Rep. No. 969, 85th Cong., 2d Sess. 51, *reprinted in* 1978 U.S. Code Cong. 2723, 2773.

IV.

The question raised by the agency as to remedies available to it should the Board order reinstatement, following reversal of an agency removal, is not ripe for judicial review. On remand from this court, the Board may affirm the agency's removal of Mr. Egan on the merits—a plausible possibility if the facts referred to by the agency are substantiated. Although the Board's decision stated that it would not review the factual underpinnings of Mr. Egan's security clearance denial, the Board remarked on Mr. Egan's criminal record and his past drinking problem. *Egan*, 28 M.S.P.R. at 523 & nn.9-10.

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[6] The *amicus* points out that the Board's decision in *Egan* would also enable an agency to deny or revoke a security clearance as a means of effecting a prohibited personnel practice, without agency hearing, Board scrutiny, or judicial review, or as a means of circumventing more cumbersome procedures that provide greater safeguards to the employee.

The Board refrained, in this apparent test case, from issuing a decision on the merits.[7]

By no procedure is the Navy required to retain an established security risk in a sensitive position. We deplore that the Navy took fifteen months to investigate Mr. Egan, whose criminal past was not only on the public record but on his employment form, meanwhile converting him from a probationary employee, who was not entitled to the safeguards here invoked, to a permanent one, who is. 5 U.S.C. §§ 7511(a)(1)(B), 7532(c)(1), 5 C.F.R. § 307.105. The dissent denigrates the important issues before us when it calls this case "comic", and misstates that "the majority employs the mere fact that Egan was conditionally hired as the basis for creating a security clearance review role for the MSPB". The appellate review role of the MSPB was created by Congress, not this court. Further, the case on appeal is not that of a "conditional" employee. Federal Personnel Manual, Ch. 307-1-7c (1982); *Lavelle v. Department of Transportation*, 17 M.S.P.R. 8.13 (1983); *Short v. Veterans Administration*, 8 M.S.P.R. 70, 72 (1981); *Smith v. Department of the Navy*, 4 M.S.P.R. 20, 22 (1980).

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[7] The dissent states that the Board's only remedy is to reinstate Mr. Egan in his job, citing as authority two government contract cases. The dissent appears to assume that the Board, on its review of the merits, will necessarily determine that Mr. Egan should not have been removed; for if the Board affirms the agency, the dismissal will be upheld. The Board itself held in *Egan*, 28 M.S.P.R. at 522, that on remand the agency may reinitiate the removal action, citing *Doe v. Casey*, 601 F. Supp. 581, 589 (D.D.C. 1985) ("employee removed in violation of agency's procedures ordered returned to administrative leave status, which he occupied prior to removal, until granted procedural due process"); and of course the agency may invoke section 7532 and avoid all Board review.

Appellate review may "punish" an agency (the dissent's word), if one so wishes to describe Congress' power to make laws governing federal employment, but such laws are of no less statutory force. *See, e.g., Vitarelli v. Seaton*, 359 U.S. 535 (1959), wherein the Court held that a petitioner who could otherwise have been discharged was entitled to reinstatement when the national security exception procedures were not followed.

The dissent also maintains that our decision would entitle the Board to substitute its judgment for that of the employing agency as to which of its employees should be entrusted with our nation's secrets. This position misperceives the nature of the Board's role in Chapter 75 removal actions. The Board does not substitute its judgment for that of the employing agency, nor can the Board do so if the removal is based on the denial or loss of a security clearance. The Board is a review tribunal exercising appellate, not original, jurisdiction. 5 C.F.R. § 1201.3(a). This point has been made in a variety of circumstances, most often in the context of penalty determination. *See, e.g., Brewer v. United States Postal Service*, 647 F.2d 1093, 1098 (Ct. Cl. 1981) ("we will defer to the judgment of the agency as to the appropriate penalty for employee misconduct, unless its severity appears totally unwarranted in the light of [relevant] factors"). While the choice of penalty is committed to the sound discretion of the agency, the Board will mitigate the agency's penalty when it is an abuse of discretion or clearly outside the bounds of reasonableness. *Miguel v. Department of the Army*, 727 F.2d 1081, 1083 (Fed. Cir. 1984).

The determination that a given employee is a security risk is also committed to the sound discretion of the agency, in accordance with the standards set forth in its regulations. Where a nexus is not apparent, the agency's determination must not be "arbitrary and perfunctory". *Hoska*, 677 F.2d at 138.

This case presents no new issues of Board review, and the Board's procedures will be no different than they have been during the years the Board has exercised the authority it now seeks to abdicate. The record does not show that any of the problems posited by the dissent occurred during that period. To the extent that Congress has authorized such review, it must continue to be implemented.

Conclusion

We conclude that the heavy weight of law and precedent, congressional intent, and fundamental rights, require that the agency action taken in *Egan* receive the same appellate review as other adverse actions taken under 5 U.S.C. § 7512. The decision of the Board is vacated and remanded for proceedings consistent with this opinion.

VACATED AND REMANDED

MARKEY, *Chief Judge*, dissenting.

Convinced that the Merit Systems Protection Board (MSPB) was never constituted a "security clearance review board", and that it should not by this court be so constituted, I most respectfully dissent.

A circumstance of grave import, ignored by the majority, is this: Egan does not challenge any fact in the listing of his 14 years of arrests and criminal acts and alcoholism—he simply disagrees with the Navy's evaluation, its *judgment*, made in light of those facts. Thus the majority is necessarily insisting that MSPB substitute *its* judgment on which employees should be entrusted with the Navy's nuclear submarine secrets and which should not. Indeed, the majority says MSPB has a "statutory responsibility" to do so (though no statute so states).[1]

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[1] The *sole issue* presented to this court by a prolix Egan is "Whether the Merit Systems Protection Board Has the Statutory Authority and Obligation to Review and Consider the Underlying Reasons for the Denial or Revocation of a Security Clearance in the Appeal of an Adverse Action by the Employing Agency Where Said Action is Based Primarily on the Denial or Revocation of Said Clearance and Where the Merit Systems Protection Board Otherwise Has Jurisdiction." (Emphasis added.) Though Egan repeatedly refers to "denial or revocation," and though the issue of the board's authority to review security clearances would encompass both, the record reflects only a "denial", not a "revocation".

Thus the majority here makes not an application of law but a choice of policy. That choice, I submit, is not only wrong but fraught with mischief. Further, I cannot find that the majority, in making that policy choice, engaged in the required balancing of Egan's interests in obtaining a clearance and the armed services' interest in fulfilling their assigned role of protecting national security.

No one has a constitutional right to be hired by the government. No one, not even one whose slate is unmarked, has a constitutional right to be granted a security clearance. Egan was conditionally hired to help repair submarines. His retention on the job was conditioned, as he knew, on whether those responsible for Navy security would grant him a security clearance. After a thorough review, all the way to the Director, Navy Civilian Personnel Command (NCPC) and after Egan had a chance to respond and to appeal to higher authority within the Navy,[2] the responsible office of the Navy declined to grant the security clearance.

Egan's immediate employing facility, Trident Naval Repair Facility (TNRF), because Egan did not get the required clearance and it had no other job for him, was forced to remove him, but Egan lost nothing to which he was entitled. If he had a property right in his job, it was a conditioned right.[3] All that happened was that the condition precedent to retention in his conditional employment did not occcur.[4]

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[2] The majority indicates, incorrectly, that Egan had no right to appeal within the Navy. He had that right, OPNAVINST 5510.1F, 16-105 Id. but on this record simply chose not to exercise it.

[3] The majority's reference to a "liberty interest" is misplaced. The Navy did not publicize its denial of Egan's security clearance. *See NeSmith* v. *Fulton*, 615 F.2d 196, 200 n.6 (5th Cir. 1980). Moreover, if Egan were defamed he has a remedy in another forum.

[4] If the majority's position should escape Supreme Court review, the Navy, and the other armed services, would be well advised (at

It did not occur because the Navy exercised its judgment and responsibility by declining to disclose its secrets to an employee with a history that included imprisonment for possessing a firearm as a felon on probation following a conviction for assault.[5]

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whatever cost to efficiency) to use only § 7532 or abandon the practice of hiring on condition that a security clearance be obtained. The alternative, under the majority's approach, is to have all denials of security clearances to civilians second guessed by MSPB (numerous appeals have already been stayed in this court).

In the present case (though hiring might have been substantially delayed), the Navy could have determined Egan's security status *before* hiring him, and, because Egan would never have become an "employee", MSPB would have had no jurisdiction, and the Navy would have entirely escaped MSPB supervision of its efforts to safeguard the country's security interests. If the Navy could accelerate its clearance review process, it could hire "on probation" and again escape MSPB supervision of its security decisions. If an employee sought a promotion to a "non-critical sensitive" position, and was denied a clearance (and thus the promotion) MSPB would have no jurisdiction. All of these considerations illustrate the comic nature of this case, in which the majority employs the mere fact that Egan was conditionally hired as the basis for creating a security clearance review role for the MSPB.

[5] The Navy's denial of security clearances to sailors is immune from supervision by MSPB and this court. It is at best incongruous to insist that the Navy's denial of a security clearance to a civilian employee must not be immune from MSPB supervision. Civilians employed on nuclear submarines, and thus privy to secret equipment on board and to the Navy's highly sensitive submarine shipping and movement schedules, can do as much harm as any sailor assigned to operate those submarines. I have grave difficulty in seeing why the Navy should be forced to keep on its nuclear submarines civilian employees who, in its judgment and after careful consideration, it has decided it cannot safely trust, any more than it should be forced to keep sailors it cannot trust on its submarines.

I trust that in this I am not unduly influenced by the thought that no MSPB presiding official and no member of the board or of this court will have to serve on a submarine repaired by persons to whom the Navy has been forced to grant security clearances against its will,

Fear of "Arbitrary" Denials

The majority decides a case not here. Like that of the presiding official, the majority's underlying rationale is a felt necessity to "protect" civilian employees against "arbitrary" denials of security clearances. *Amicus* and the majority see the boogy-men of "specious, arbitrary, discriminatory" clearance denials, citing no evidence that those horror stories are factually based, supplying no description of how they could happen under OPNAVINST 5510.1F., and giving no reasons *why* those responsible for Navy security would want to engage in such chicanery, or why a due process review by MSPB would not serve to catch and rectify any denial of a clearance made without due process.[6]

Whence the fear of arbitrary denials? Whence the automatic refusal of even a modicum of at least initial trust in Navy officials? Whence the disregard of the process (denial response denial appeal final denial) conducted by the Navy under OPNAVINSt 5510.1F before denying a clearance?

There is no evidence, and not even a claim, that any Navy official had any personal dislike of Egan. Indeed, he was hired and removed by TNRF, and his clearance was denied by the NCPC, and then only *after* an opportunity to respond and appeal. There is not even an assertion that any Navy official involved in the clearance review process

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infra. Nor, I trust, have I been influenced by the many current press accounts of convicted spies who escaped detection, and the accompanying criticisms of officials who failed to guard the nation's security interests.

[6] The majority distinguished *Crofoot* and *McGean* on a basis that the employing agency did not play a part in creating the basis for removal. Though the Navy, broadly speaking, is the "agency" here, the separation between TNRF and NCPC is not meaningfully distinct from the separation between the entities involved in *Crofoot* and *McGean*.

ever met Egan. Nor is there any basis for the assumption that the Navy could have an interest in the ridiculous enterprise of hiring Egan and then scheming to deny itself his services by "arbitrarily" denying him a clearance.

Egan does not, and could not, claim that the Navy acted in "bad faith" in denying him a clearance, and there is nowhere in the record even a whiff of the "well-nigh irrefragible proof" required to establish such bad faith. *See Kalvar Corp., Inc.* v. *United States*, 543 F.2d 1298, 1301-02 (Ct. Cl. 1976), *cert. denied*, 434 U.S. 830 (1977).

The conjecture that Navy officials might act arbitrarily is not only unwarranted, it is far too weak a reed on which to rest a determination that MSPB must decide which employees of the armed forces should be granted security clearances. Given that the responsibility is the Navy's, and given the system of high level, objective, impersonal, decisionmaking employed by the Navy in carrying out that responsibility, including the employee's chance to respond and to appeal to higher authority within the agency, I can see no reason why, under those circumstances, the Navy should not be allowed to exercise its *judgment* in exercising *its* authority to grant or deny security clearances.

Moreover, the majority engages in no balancing of the potential risk it imagines (arbitrary denials) with the actual risk it creates (board and court interference in security decisions).

Egan is Already "Protected"

The majority slides too easily by the fully adequate due process protections provided Egan under the Navy's regulation, OPNAVINST 5510.1F, which, it is undisputed, the Navy followed to the letter. NCPC notified Egan in writing of the intent to deny him a security clearance, gave Egan all the reasons and access to all information on which that intent was based, and afforded Egan an opportunity to respond. Egan did so through a representative and in writing, not challenging the facts cited by the Navy but disagreeing with the Navy's judgment and arguing that he should be granted a clearance. NCPC considered Egan's response and notified Egan of his final decision to adhere to the denial, again citing reasons. Egan was notified in writing of his right to appeal to higher authority within the Navy (to the Assistant Deputy Chief of Naval Operations). From the record, Egan declined to file such an appeal, but proceeded promptly to MSPB.

The majority apparently believes Egan must have a full evidentiary hearing on whether he should be granted a security clearance, even though there is no material fact issue to resolve. In any case, due process does not require such a hearing. *Cafeteria & Restaurant Worker's Union, Local 473, AFL-CIO* v. *McElroy*, 367 U.S. 886, 894-899 (1961).

Moreover, the majority incorrectly implies that Egan would get more "process" if the Navy had proceeded under § 7532. Egan was given a right to appeal under OPNAVINST 5510.1F not available under § 7532. Egan was given a right to a full statement of reasons that is available under § 7532 only if national security considerations "permit". It is true that § 7532 provides for a hearing, but as indicated above, a hearing is not required in Egan's case.

In denying Egan a clearance, the Navy followed Executive Order 10450, which treats a security clearance for what it is, a grant of trust, requiring an *affirmative determination* that *granting* a clearance would be *clearly consistent* with the interests of national security, and requiring "an overall, common sense determination based on all available information."

As would any judge, I join the majority's desire that Egan receive a "full and fair consideration of his case." But, assuming he has a "case" for a security clearance, he has had precisely that. After completion of the OPNAVINST process, there is nothing more to consider.

There is no fact dispute and no law to apply to the Navy's judgment. *All* that remains is the possible substitution of MSPB's judgment.

Egan had no "right" to receive a security clearance. Because a clearance was a condition precedent to his job retention, it can be argued that Egan had a right not to be denied a clearance without due process (i.e., "arbitrarily"). *That* right was fully protected here.

The Majority's Transfer of Authority and Responsibility

The authority to grant or deny a security clearance is committed to the sound discretion of executive agency heads. *See* Exec. Order 10450, 3 C.F.R. 936 (1953 Comp.) *reprinted as amended in* 5 U.S.C. § 7311 (1982) note:

> Sec. 2 The head of each department and agency of the Government shall be responsible for establishing and maintaining within his department or agency an effective program to insure that the employment and retention in employment of any civilian officer or employee within the department or agency is clearly consistent with the interests of the national security.

It is to me clear that, if this court compels MSPB to determine the "reasonableness" of security clearance determinations, the result is to transfer the sound discretion to grant or deny security clearances from the head of the executive agency concerned (Navy) to another, and less qualified, executive agency (MSPB). The majority cites no authority, and none exists, for the notion that security decisions of one executive agency should be reviewed, and occasionally overturned, by another executive agency.

The majority's decision will necessarily, and grievously, impair not only an independent operation of the armed services and other executive agencies and departments, it will dilute the responsibility the President placed on them to insure that civilian employment is "clearly consistent with the interests of national security". Indeed, as described below, the majority's decision will effectively gut Executive Order No. 10450.

MSPB properly understood the President's order committing security clearance matters to the sound discretion of the department or agency as requiring MSPB, as an administrative tribunal, to exhibit a deference to military judgments on security clearances not unlike that traditionally exhibited by courts in relation to matters within military purview. *Cf. Williams* v. *Secretary of the Navy*, 787 F.2d 552 (Fed. Cir. 1986).

The majority's mandate that MSPB make its own judgment on whether a security clearance should be denied or granted transfers the right to judge from the expert, authorized agency to MSPB and this court, both of which lack the needed individual and institutional competence. It also runs clearly contrary to well-established principles of deference owed national security determinations of executive agencies. As below indicated, it also runs contrary to the jurisprudence of this court.

MSPB "Jurisdiction"

The majority's facile leap, from the board's general jurisdiction to review removals to the notion that the exercise of that jurisdiction must include authority to review the reasonableness of security judgments, is unnecessary and unwarranted.

Hence the majority's statement that there is "no indication that Congress intended this type of removal action to be exempt" is irrelevant.

The majority rests on the statutory jurisdiction of the board to review removals. But no one is arguing that question. That MSPB jurisdiction is present (because employment is affected), however, is not controlling.[7] MSPB recognized that it *had* jurisdiction to consider Egan's removal, and it *exercised* that jurisdiction, determining that Egan had not been denied due process. Though the board referred to "jurisdiction" to review the "underlying national security considerations inherent in security clearance determinations," it had to be referring to the *scope* of the jurisdiction it was in fact exercising. Indeed, the majority at one point recognizes that the issue before us is not "jurisdiction" but the "scope and standard of review" MSPB should exercise.

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[7] The majority makes much of the "availability" of § 7532 to the Navy, and that its use would enable the Navy to escape MSPB review

As this court has so often said, MSPB has only the jurisdiction Congress granted it. *See, e.g., Cowan* v. *U.S.*, 710 F.2d 803, 805 (Fed. Cir. 1983). Having never specifically granted MSPB jurisdiction to conduct hearings on security clearances, Congress has not signalled an intent that MSPB should use the jurisdiction it was granted as authority to inject itself into that sensitive area committed to the Executive branch. This court is not authorized, of course, to grant MSPB a jurisdictional scope so broad.

That a claim of denial of due process is within the scope of MSPB review in this case is undisputed. MSPB agreed that it should, and did, review Egan's removal to insure that it was accompanied by due process. Egan does not assert a failure of the Navy to follow its regulations or any statute. As MSPB correctly observed, "there is present within the agency or the applicable entity a procedure for affording at least minimal due process protections, i.e.,

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of its security clearance denials. No recognition is given, however, to the limitation of § 7532 to employees with "permanent" or "indefinite" appointments, and the question of its applicability to Egan whose appointment was *conditional*. That the Navy did not argue inability to use § 7532 is no basis for punishing it by subjecting its judgments on security clearances to second guessing by MSPB, or for disregarding the arguments it did make.

notice of the agency's determination, a statement of its reasons in support of the determination, and an opportunity for the affected individual to be heard." 28 M.S.P.R. at 519, *citing inter alia DeSarno* v. *Department of Commerce*, 761 F.2d 657, 660 (Fed. Cir. 1985), and *Cleveland Board of Education* v. *Loudermill*, ____ U.S. ____, 105 S. Ct. 1487, 1495 (1985).

The majority lists a first category of cases in which the scope of MSPB's review was not restrained, and a second category of cases in which that scope was restrained. The second category contained the only cases involving underlying decisions of the armed services. Yet the majority elects to drop the present case, involving an underlying decision of an armed service, into the *first* category, without telling us *why* (except fear of arbitrariness) it should not be placed in the *second* category.

This court has affirmed MSPB's recognition of restraints on the *scope* of MSPB's exercise of its jurisdiction in appropriate circumstances. *See, e.g., Buriani* v. *Department of the Air Force*, 777 F.2d 674, 677 (Fed. Cir. 1985) (loss of employment-controlling active air reserve status because of failure to attain promotion not reviewable); *Zimmerman* v. *Department of the Army*, 755 F.2d 156, 157 (Fed. Cir. 1985) ("the Board does not have the jurisdiction to examine military assignments and transfers"); *see also Schaffer* v. *Department of the Air Force*, 8 MSPB 631, 9 M.S.P.R. 305 (1981), *aff'd*, 694 F.2d 281 (D.C. Cir. 1982). Considerations compelling still greater restraint are implicated when it is suggested that MSPB should affirm or reverse on the merits decisions of military authorities made in a due process procedure in the interests of national security.

That no one contests the foundation on which the majority builds, i.e., that MSPB has jurisdiction to review all matters within its jurisdiction, including removal actions, 5 U.S.C. §§ 1205(a), 7512, and 7701, does *not* mean that in reviewing a removal action, the board must review the merits of all agency actions which preceded or, indeed, precipitated the removal. The majority recognizes that this court has repeatedly so stated. *Bacon* v. *Department of Housing and Urban Development*, 757 F.2d 265, 269-70 (Fed. Cir. 1985) (no MSPB authority to probe mental processes of agency head for reasons he conducted reduction-in-force); *Madsen* v. *Veterans Administration*, 754 F.2d 343 (Fed. Cir. 1985) (in reduction-in-force related adverse action, no MSPB power to review merits of agency's prior classification of bumping employee or his qualifications); *see also Crofoot* v. *Government Printing Office*, 21 M.S.P.R. 248, 252 (1984), *rev'd on other grounds*, 761 F.2d 661, 665 (Fed. Cir. 1985) (MSPB does not re-examine reasons behind criminal conviction); *McGean* v. *National Labor Relations Board*, 15 M.S.P.R. 49, 53 (1983); *Buriani, supra.*

The facts and reasoning in *Zimmerman* and *Buriani*, make clear that there is no basis whatsoever for distinguishing them from the case before us.

Ms. Zimmerman sought reinstatement to her civilian position by arguing to the MSPB that the Army had erroneously denied a condition precedent to retention of that position (membership in her Reserve unit). This Court, however, gave short shrift to that argument. It flatly rejected the notion that the MSPB should have reviewed the reasons for the Army's denial of her Reserve status, saying "the Board does not have the jurisdiction to examine military assignments and transfers." *Zimmerman* v. *Department of the Army*, 755 F.2d at 157. It would appear impossible, respecting MSPB authority, to distinguish the military's denial of Ms. Zimmerman's condition precedent (Reserve status) from the military's denial of Egan's condition precedent (security clearance).

Mr. Buriani was a civilian employee of the Air Force who was not militarily promoted, a condition precedent to his maintaining the grade of his civilian position. This court limited the MSPB inquiry to whether Mr. Buriani was promoted, holding that any other inquiry would be an inappropriate "wide ranging collateral inquiry into the selection board." If MSPB may not inquire into the military's refusal to grant a civilian employee a military promotion, it strains credulity to suppose that it must inquire into the military's refusal to grant a civilian employee a security clearance.

Zimmerman, Buriani, and Egan were all civilian employees against whom adverse actions were taken because, and solely because, the military refused them a status required for job retention. MSPB heard all three cases, yet only in Egan's does the majority say MSPB must inquire into the military's refusal to grant the necessary status. Principled decisionmaking requires more than a mention of Zimmerman's and Buriani's Reserve status as justification for the present departure from this court's precedents.

Separation of Powers

The majority ignores entirely the government's argument based on the constitutional principle of separation of powers. The protection of classified information is an executive responsibility flowing from the President's constitutional mandate to provide for the national defense. U.S. Const., Art. II, § 2.

> [I]t is the constitutional duty of the Executive—as a matter of sovereign prerogative and not as a matter of law as the courts know law—through the promulgation and enforcement of executive regulations, to pro-

> tect the confidentiality necessary to carry out its responsibility in the fields of international relations and national defense.

New York Times Co. v. *United States*, 403 U.S. 713, 729-30 (1971) (Stewart, J., concurring); *see United States* v. *Marchetti*, 466 F.2d 1309, 1315 (4th Cir. 1972), *cert. denied*, 409 U.S. 1063 (1972). In exercising his constitutional responsibility, the President reserved to heads of federal agencies, as above indicated, the decisions on who is entitled to hold a security clearance. Executive Order 10450, *supra.*[8]

Where, as here, no deprivation of a constitutional right or statutory violation is involved, the courts have declined to intrude into the sphere of Presidential responsibility for national defense, in recognition of the constitutionally mandated separation of powers. *See, e.g. Haig* v. *Agee*, 453 U.S. 280, 292 (1981); *Gilligan* v. *Morgan*, 413 U.S. 1, 7-11 (1973); *Laird* v. *Tatum*, 408 U.S. 1, 14-15 (1971); *Orloff* v. *Willoughby*, 345 U.S. 83, 93-94 (1953); *Buriani* v. *Department of the Air Force*, 777 F.2d 674, 676 (Fed. Cir. 1985), *quoting Zimmerman* v. *Department of the Army*, 755 F.2d 156, 157 (Fed. Cir. 1985); *Adams* v. *Laird*, 420 F.2d 230, 239 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 1039 (1970); *Greene* v. *McElroy*, 254 F.2d 944, 953 (D.C. Cir. 1958), *rev'd on other grounds*, 360 U.S. 474 (1959).

Because the Constitution assigns national security matters to the Executive Branch, the courts have not developed the institutional competence to decide them. In

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[8] Congress has granted to the secretaries of the military services, including the Navy, broad discretion regarding matters falling within their sphere to assure that the services may fulfill their assigned missions of protecting the national defense. *See* 10 U.S.C. §§ 133, 5012, and 5031 (1982); *Cafeteria and Restaurant Workers' Union, Local 473, AFL-CIO* v. *McElroy*, 367 U.S. 886, 890 (1961).

Greene v. *McElroy*, 254 F.2d at 953, the court explained why it should not review the merits of an agency's security clearance revocation:

> There must be a "justiciable" controversy-one which the courts can finally and effectively decide, under tests and standards which they can soundly administer within their special field of competence. Here there is no such controversy. As we have seen, Greene makes no claim of lack of compliance by the Government with its own regulations. He attacks the Secretary's decision on its merits and as a matter of constitutional right. But for a court to hear de novo the evidence as to Greene's fitness to be assigned to a particular kind of confidential work would be a bootless task, involving judgments remote from the experience and competence of the judiciary. Indeed, any meaningful judgment in such matters must rest on considerations of policy, and decisions as to comparative risks, appropriate only to the executive branch of the Government.

The actual judgment on whether to grant or deny a security clearance requires specialized expertise, is predictive, is judgmental and neither factual nor legal, requires no knowledge of legal or Civil Service/Merit principles (because there "is no law to apply"), and rests on policy considerations and risk comparisons. The majority does not tell us why an MSPB presiding official, or MSPB itself, is better, or even equally, qualified to make that judgment than are the responsible military officials. "We are not in an area where absolutes obtain, and the grant or denial of security clearances is an inexact science at best. Those who have that responsibility have to do the best they can with what they have. . . ." *Adams* v. *Laird*, 420 F.2d at 239.

What Now?

The majority's too-easy dismissal of the agency's concern over its remedies (if MSPB reinstates Egan) is unfair. When the law is clear, judicial decisions certainly must not be controlled by results. But where, as here, no statute authorizes or requires MSPB to review security clearance judgments of the armed services, a court should not render a decision that it must do so with *no* regard for the havoc the court may thereby create. In the present case, the court should not simply finesse the Navy's question "what now"?

A moment's thought to consequences establishes that the majority's approach will engender absurd results. The presiding official, believing herself so empowered and qualified, held that despite Egan's criminal record and a history of alcohol dependence, the Navy's judgment that he should be denied security clearance was "unreasonable." If the MSPB, despite its non-expertise, decides that the Navy's clearance denial was "unreasonable", it would have to reverse Egan's removal and order the Navy to reinstate Egan as a repairman on its submarines (with consequent exposure of its secrets). Does the majority intend that MSPB *order* the Navy to grant Egan a security clearance? Why not, its denial having been found "unreasonable"? And, before the board reversed *Bogdanovicz* in this case, MSPB presiding officials repeatedly *did order* the Navy to grant security clearances. *See Skees* v. *Dept. of Navy*, No. PH0752 8410257, slip op. at 13 (June 14, 1984); *Peterson* v. *Dept. of Navy*, No. BN07528410257, slip. op. at 9 (Feb. 14, 1984); *Irving* v. *Dept of Navy*, No. BN07528410005, slip op. at 9 (Feb. 3, 1984).

Where shall MSPB say the Navy erred in its denial? What criteria for granting or denying security clearances should *MSPB* establish? If MSPB sets forth no clear, all-encompassing criteria, how shall the Navy, or any armed service, or any executive agency, know when its grant or denial of a security clearance will pass muster at MSPB? Should any such MSPB criteria supplant that employed now by the Navy in OPNAVINST 5510.1F CH 4, 16-102?

If MSPB and this court are to be the final decision-makers on whether and which employees should be trusted with our nation's security, how could the officials of the armed services rely on their judgment of whether granting a clearance would be "consistent with the interests of national security"? What objective facts can those responsible officials correctly cite to "prove by a preponderance of the evidence" that this or that employee *will* reveal defense secrets? How does one *prove* his *judgment* that a particular employee *might* disclose secrets?

It must be remembered that the *only* remedy which MSPB can grant is reinstatement of Egan in his job. In this regard, this court has said it is appropriate to look to the authority Congress has provided in connection with relief. *See Electronic Data Systems Federal Corp.* v. *General Services Administration Board of Contract Appeals*, 792 F.2d 1569 (Fed. Cir. 1986); *United States* v. *Amdahl Corp.*, 786 F.2d 387 (Fed. Cir. 1986). The majority unfairly avoids the limitation on the board's remedial authority by merely saying the issue of relief is not ripe.

If the presiding official's determination be reinstated on remand, it is clear that the Navy must either grant or again deny a security clearance to Egan. In light of the responsibility it bears, it is inconceivable that the Navy would grant Egan a clearance while remaining convinced of his unreliability. If the Navy may persist in denying Egan a clearance, must it nonetheless continue to employ him in the submarine repair work for which he was conditionally hired? How could the Navy do that (except by the impossible step of removing the security clearance requirement for all persons doing that work and thereby made privy to

Navy secrets)? If the Navy retains a security clearance for the job, and does not give Egan his original job and a clearance, must the Navy find him an equal-pay job that does not require a clearance? Must it do so without regard for Egan's qualifications for such other job? It being established that there are no such other jobs, must the Navy pay Egan for not working (because he has no clearance)?

The foregoing and similar considerations make it impossible for me to imagine how the result reached by the majority can be seen as serving "to promote the efficiency of the service." Together they force this dissent.

CONCLUSION

MSPB correctly held that "in an adverse action over which the Board has jurisdiction and which is based substantially on the agency's revocation or denial of a security clearance, the Board has no authority to review the agency's stated reasons for the security clearance determination." That holding was supported by compelling, sound considerations of long-established deference and public policy. It should be affirmed.

APPENDIX B

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

DOCKET NUMBER SE07528310257

THOMAS M. EGAN, APPELLANT,

v.

DEPARTMENT OF THE NAVY, AGENCY.

DATE: AUG 8, 1985

BEFORE
Herbert E. Ellingwood, Chairman
Maria L. Johnson, Vice Chair
Dennis M. Devaney, Member

OPINION AND ORDER

Appellant was removed from his position as Laborer Leader with the Trident Naval Refit Facility on the basis that he was unable to obtain a security clearance, which was a requirement of his position.[1] The agency specified that maintenance of a security clearance was a mandatory condition of employment and that the Naval Civilian Personnel Command denied appellant's clearance based on the results of a background investigation concerning appellant's reliability, trustworthiness, and judgment. Appellant appealed his removal to the Board's Seattle Regional Office. Following the parties' submission of evidence in lieu of a hearing, the presiding official found that the Board had authority to review the propriety of the denial of the security clearance under *Hoska* v. *Department of the Army*, 677 F.2d 131 (D.C. Cir. 1982), and *Bogdanowicz* v. *Department of the Army*, MSPB Docket No. PH07528110587 (September 27, 1983). The presiding official then found that the agency failed to establish that its denial of appellant's security clearance was reasonable and therefore reversed the agency action.

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[1] The position description for Laborer Leader specifically stated that the "TRIDENT Refit Facility Bangor, (TRIREFAC) Bremerton, Washington . . . is an immediate maintenance activity (IMA) developed to support quick turnaround repair, replenishment and systems checkout of the TRIDENT submarine over its extended operating cycle." *See* Agency Exhibit, Tab 4. The responsibilities of appellant's position, which fell under the auspices of the Repair Department of the facility, included the inspection of work, the change of "work plans, work assignments, and methods as necessary to reduce or control costs and maintain schedule." *Id.* The position

In its petition for review, the agency: (1) challenged the Board's jurisdiction and authority to review the merits of the security clearance denial and the removal actions; (2) alleged error by the presiding official in her assessment of the evidence submitted; and (3) contended that, even assuming *arguendo* that the Board had jurisdiction over the merits of the case and determined that the agency failed to support its action, the appropriate remedy was not to reverse the removal but to remand the case to the agency to correct any errors. In response to the agency's petition for review, appellant asserts the correctness of the initial decision.

The agency's petition for review is GRANTED.

ISSUES

This case and a number of others pending before the Board raise significant issues of law relating to appeals of actions taken under 5 U.S.C. § 7511 *et seq*. and based on

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description further stated that appellant's working conditions included "work[ing] in shop and waterfront areas and aboard ships/submarines." *Id*.

the agency's revocation or denial of the employee's security clearance. Consequently, by notices published in the Federal Register, the Board solicited *amicus* briefs on those issues. *See* 50 Fed. Reg. 2355 (January 16, 1985); 49 Fed. Reg. 48623 (December 13, 1984). In response to the Federal Register notices, some twelve briefs were submitted for the Board's consideration. Requests for oral argument by the Office of Personnel Management (OPM) and the National Security Agency are hereby DENIED.[2]

The issues on which *amicus* briefs were solicited were:

I. *Scope of the Board's Authority in Security Clearance cases:*

A. Whether, in an adverse action case over which the Board has jurisdiction, and which is based substantially on the agency's revocation or denial of a security clearance, the Board has the authority to review the agency's stated reasons for revoking or denying the security clearance. Specifically address whether any law, rule, or regulation concerning national security expressly or impliedly restricts the Board from reviewing the agency's stated reasons for revoking or denying the security clearance.

B. Whether, if the Board has such authority, the Board's scope of authority extends to ordering the agency to reinstate the security clearance.

C. When an agency wishes to base an action listed in 5 U.S.C. § 7512 on the revocation of a security clearance, may it do so pursuant to 5 U.S.C. § 7513, or is 5 U.S.C. § 7532 the exclusive basis for such an action?

II. *Alternative Remedies*

A. If the Board's authority does not extend to ordering reinstatement of the security clearance, what alternative remedies may the Board order?

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[2] However, the Board has accepted and considered the June 25, 1985 supplemental *amicus* brief submitted by OPM.

DISCUSSION

I.

A. *Whether, in an Adverse Action Case Over Which the Board has Jurisdiction, and Which is Based Substantially on the Agency's Revocation or Denial of a Security Clearance, the Board has the Authority to Review the Agency's Stated Reasons for Revoking or Denying the Security Clearance*

The Washington Legal Foundation and all federal agencies which responded to the Federal Register notices contend that the Board has no authority to review the underlying reasons upon which a negative security clearance determination is based. They contend that while the Board has jurisdiction over adverse actions which are taken under 5 U.S.C. § 7512[3] and which are based upon negative security clearance determinations, the Board has no express or implied legal authority to review security clearance determinations. They further assert that review by the Board in those cases should be limited to procedural due process concerns.

The American Civil Liberties Union (ACLU) of Washington and the ACLU of Washington Foundation, as well as the federal employee unions which responded, assert that the Board has the authority to review security clearance determinations. They urge that the Board review the underlying reasons for the security clearance determination in order to ascertain whether the agency has shown the necessary nexus between the employee's conduct upon which the security clearance determination was based and the employee's ability to safeguard confidential information. They contend that if Congress had intended to exclude security clearance determinations from review under 5 U.S.C. § 7512, it would have so stated. They assert that the Board must address the underlying reasons for the determination in order to afford the employee meaningful due process.

Statutory Background

The Board has statutory jurisdiction over removal actions taken pursuant to 5 U.S.C. Chapter 75, and regulatory jurisdiction under 5 C.F.R. Part 752. Moreover, by 5 U.S.C. § 1205, the Board is mandated to adjudicate all matters within its jurisdiction. Employees are given the right to invoke the Board's jurisdiction over any appealable action by virtue of 5 U.S.C. § 7701.

In addition, 5 U.S.C. § 7532 creates an expedited procedure for termination of employees by an agency head on national security grounds. While section 7512(A) specifically excludes from Board review actions taken pursuant to section 7532, it does not define the scope of the Board's authority, if any, in adverse actions based on security clearance considerations and not taken under that section.

The provisions of 5 U.S.C. §§ 7512 and 7513 involve, *inter alia*, the Board's jurisdiction over the ultimate adverse action taken by an agency. They do not specifically address the extent of the Board's review of the underlying determinations upon which the adverse action is based. Thus, these statutory provisions do not provide a sufficient basis for the Board to determine the extent of its review of the underlying security clearance determination over which it is not plainly given jurisdiction.

The legislative history of the Civil Service Reform Act of 1978 (hereinafter referred to as the "Reform Act"), Pub. L. No. 95-454, 92 Stat. 1111 (codified in various sections of title 5, United States Code), also does not address the extent of the authority Congress intended the Board to exercise in reviewing revocations or denials of security clearances which result in Chapter 75 actions.

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[3] Section 7512 contains a list of those adverse actions within the scope of Chapter 75: removal, suspension for more than 14 days, reduction in grade, reduction in pay, and furlough of 30 days or less.

The legislative history of section 7512 states that "[a]dditional exceptions conforming this section [7512] to other provisions of title V cover employees subject to section 7532 (national security)" as well as other categories of employees. *See* S. Rep. No. 969, 95th Cong., 2nd Sess. 4, *reprinted in* 1979 U.S. Code Cong. & Ad. News 2723, 2772. The legislative history does not include an identification of "other categories of employees" not covered by section 7512, and there is no mention of the coverage of security clearance denials under that section. The legislative history also makes it clear that certain agencies, positions, and formerly appealable actions are excluded from the coverage of various sections of the Reform Act, including section 7512. *See* H.R. Rep. No. 1717, 95th Cong., 2d Sess. 4, *reprinted in* U.S. Code Cong. & Ad. News 2860, 2861 and H.R. Rep. No. 1403, 95th Cong., 2d. Sess. (1978). It contains no further exceptions or statements, however, which address the security clearance issue, either directly or indirectly. Thus, it cannot be determined from the legislative history of the pertinent statutory provisions to what extent Congress intended the Board to exercise authority in section 7512 adverse actions based on security clearance determinations.

Case Law

The only federal appellate court which has reviewed a Board decision in an adverse action based on a security clearance determination is the Court of Appeals for the District of Columbia, in *Hoska* v. *Department of the Army, supra.*

In *Hoska*, the employee was removed from his position subsequent to the agency's revocation of his security clearance. The presiding official reviewed the merits of the revocation and sustained the agency action. The initial decision became a final decision of the Board when the employee failed to file a petition for review with the Board within the 35-day time limit. On the employee's appeal, the court found that the agency action was based on unsubstantiated hearsay, which did not amount to substantial evidence, and that the agency failed to show a rational nexus between the employee's conduct and his ability to safeguard classified information. Accordingly, the court reversed the removal action and remanded the case to the Board "to order appropriate relief, including reissuance of [the employee's] security clearance, reinstatement, back pay, and such other relief as may be warranted." *Hoska, supra,* at 145.

It is significant to note that, at no point in the *Hoska* decision did the court expressly address the Board's authority to review the underlying reasons for the agency's security clearance determination. The court merely reviewed those issues already decided by the presiding official, without specifically determining the propriety of that degree of Board review, and decided the case under the standard of review applicable to the court. Thus, to the extent that appellant relies upon *Bogdanowicz* and other Board cases which cite to *Hoska*[4] for the proposition that the Board has the authority to review the propriety of the agency's revocation or denial of a security clearance, we find this reliance misplaced and, in light of our findings, *infra*, now overrule that holding.

In sum, we find that neither the statutory framework, nor previous case law resolves the issues raised in this case. We turn now to a discussion of additional authorities.

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[4] Moreover, as a decision issued by the U.S. Court of Appeals for the District of Columbia Circuit, *Hoska* is persuasive authority only and not precedential for Board decisions. *See* 5 U.S.C. § 7703, granting a right of appeal from final Board decisions to the U.S. Court of Appeals for the Federal Circuit.

Foremost among other considerations is the authority to grant or deny a security clearance, which is committed by law exclusively to the employing agencies within the executive branch of government. Executive Order 10450, *reprinted in* 5 U.S.C. § 7311 note, provides *inter alia*, that "[t]he head of each department . . . shall be responsible for establishing and maintaining . . . an effective program to insure that the employment and retention in employment of any civilian officer or employee within the department or agency is clearly consistent with the interests of national security."

The commitment of security clearance matters to agency discretion is analogous to the deference with which courts have treated matters traditionally within military purview. When faced with requests for review of such matters, courts have deferred to the military's primary authority and have refused review absent an allegation of the deprivation of a constitutional right. In *Mindes* v. *Seaman*, 453 F.2d 197 (1971), the Court of Appeals for the Fifth Circuit reviewed those internal military affairs which would normally not be subjected to judicial review. In doing so, the court pointed to a number of considerations militating against judicial review: peculiar military expertise; concern over stultifying the vital missions of the military; and judicial inclination to commit the matter in question to the military. *Id.* at 200-201.

These considerations were weighed against the nature and strength of the appellant's claim, and the potential of injury if review were denied. On balance, the court found that there was a "judicial policy akin to comity". *Id.* at 199.

Other courts have adopted this same approach to military matters. *See, e.g., Oestereich* v. *Selective Service Systems*, 393 U.S. 233 (1968) (exemption from selective service); *Burns* v. *Wilson*, 346 U.S. 137 (1953) (court martial conviction); *Orloff* v. *Willoughby*, 345 U.S. 83, 93-94 (1953) (review of military assignments). *See also Zimmerman* v. *Department of the Army*, 755 F.2d 156 (Fed. Cir. 1985) (loss of reserve membership); *Thornton* v. *Coffey*, 618 F.2d 686, 691 (10th Cir. 1980) (promotions); *Yee* v. *United States*, 512 F.2d 1383 (Ct. Cl. 1975) (promotions).

Despite the broad jurisdictional grants to the Board in 5 U.S.C. Chapter 75, the Board has recognized restraints in the extent of the exercise of this jurisdiction in appropriate circumstances.[5] For example, the Board has declined to consider the merits of military personnel decisions resulting in an employee's loss of membership in the active reserve. *See Buriani* v. *Department of the Air Force*, MSPB Docket No. SF0/528410637 at 2 n.2 (December 6, 1984), *appeal pending*, No. 85-1890 (Federal Circuit); *Schaffer* v. *Department of the Air Force*, 8 MSPB 631 (1981), *aff'd*, 694 F.2d 281 (D.C. Cir. 1982). *See also Zimmerman, supra*, ("the Board does not have the jurisdiction to examine military assignments and transfers").

Similarly, in adverse actions based on criminal conviction, the Board does not re-examine the reasons behind the conviction to determine the appellant's innocence or guilt. *See Crofoot* v. *United States Government Printing Office*, 21 M.S.P.R. 248, 252 (1984), *rev'd on other grounds*, 761 F.2d 661, 665 (Fed. Cir. 1985). Neither does the Board examine the reasons for bar decertification where an employee is removed for failure to maintain bar membership. *See McGean* v. *National Labor Relations Board*, 15 M.S.P.R. 49 (1983). These Board decisions are based upon similar considerations to those outlined in *Mindes*. We find that those considerations are relevant in the security clearance context. In all these contexts, the underlying actions, *i.e.*, termination of reserve status, conviction of a crime, and bar decertification, are committed to appropriate procedures within the respective entities and, additionally involve determinations wherein the Board lacks a specific grant of jurisdiction. Moreover, *Zimmerman, Buriani*, and *Schaffer* manifest a proper Board concern against treading into areas which are sensitive by virtue of their national security implications.

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[5] Generally in adverse action cases, the Board, in determining whether the agency has proved its case by preponderant evidence as required by 5 U.S.C. § 7701(c)(1)(B), has the authority to review the merits of the case, including the merits of the underlying reasons upon which the adverse action is based. *See Ketterer* v. *U.S. Department of Agriculture*, 2 MSPB 459, 462 (1980) (where the employee's refusal to accept reassignment results in removal, the Board will review the merits of the agency's stated basis for the reassignment upon the employee's challenge of the agency's basis); *Cf. Losure* v. *Interstate Commerce Commission*, 2 MSPB 361, 366 (1980) (Board will review the merits of the agency's stated reasons for a reduction-in-force action upon the employee's presentation of evidence challenging the agency's reasons).

Present also in these contexts is a mechanism by which the employee could obtain review of the underlying actions. In *Rolles* v. *Civil Service Commission*, 512 F.2d 1319 (1975), for example, the Court of Appeals for the District of Columbia remanded to the Civil Service Commission an appeal by an employee who had been terminated after loss of military reserve status. Stressing that the only issue before it was the legality of the dismissal, and not the employee's reserve status, the court nevertheless held that what it found repugnant to due process was that "nowhere in the military or civilian proceeding was Rolles afforded the chance to refute the charges set forth in reputation-damaging detail. . . ." *Id.* at 1321.

The application of these considerations to the Board's review of security clearance issues leads us to conclude that a similar approach is proper here. We begin with the fact that an adverse action based on the loss of a security clearance is a bifurcated proceeding in which the Board's explicit authority extends only to the ultimate adverse action. If the Board were to exercise complete review over the underlying security clearance determination, it would

inevitably be faced with agency exposition of highly sensitive materials and Board determinations on matters of national security. We find that the underlying national security considerations inherent in a security clearance determination involve such a degree of sensitivity that we should not infer jurisdiction over that determination, particularly in light of Executive Order 10450, which commits such actions to agency discretion.[6]

Further, in those determinations concerned with reserve status, criminal culpability, and bar decertification, due process procedures and related expertise are reposed in the particular entity rather than the Board. In this regard, the court in *Greene* v. *McElroy*, 254 F.2d 944, 949 (D.C. Cir.), *rev'd on other grounds*, 360 U.S. 479 (1958), pointed out:

> [T]he Secretary of the Navy has, and of necessity must have, wide latitude in designating persons qualified for access to classified defense information in situations like the present—namely, where the problem relates to the selection of persons to be given that information for the purpose of designing or producing for the Government weapons or other defense materials. Authority of that sort is a necessary adjunct to the power and duty to defend the security of the nation. . . .

Moreover, as set out in *Mindes, supra*, the countervailing factors relating to the nature of the claim and potential for injury to the appellant are addressed to the extent that there is present within the agency or the applicable entity a procedure for affording at least minimal due process protections, *i.e.*, notice of the agency's determination, a statement of its reasons in support of the determination, and an opportunity for the affected individual to be heard. *See DeSarno* v. *Department of Commerce*, 761 F.2d 657, 660 (Fed. Cir. 1985); *Doe* v. *Casey*, 36 F.E.P. 1265, 1269 (D.D.C. 1985); *Rolles, supra*, at 1321. *See also Greene* v. *McElroy*, 360 U.S. 474, 502 (1958). *Cf. Cleveland Board of Education* v. *Loudermill*, 105 S.Ct. 1487, 1495 (1985), *citing Arnett* v. *Kennedy*, 416 U.S. 134, 170-71 (1974) (minimal due process protections held applicable to termination of tenured state employees).

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[6] The employee, of course, is not precluded from pursuing any available right to judicial review of the agency's negative security clearance determination.

Finally, we must recognize, in construing the breadth of the Board's jurisdiction under Chapter 75, that we are not a court of general jurisdiction. The Board has no Article III status and is purely a creation of statute. *See Douglas* v. *Veterans Administration*, 5 MSPB 313, 316 (1981).

In sum, we hold that, in an adverse action over which the Board has jurisdiction and which is based substantially on the agency's revocation or denial of a security clearance, the Board has no authority to review the agency's stated reasons for the security clearance determination. However, the Board will review the procedures utilized by the agency to ensure that the agency afforded the appellant procedural due process. We further hold that the minimal due process rights that must be afforded the employee upon the agency's denial or revocation of a security clearance are: notice of the denial or revocation; a statement of the reason(s) upon which the negative decision was based; and an opportunity to respond.

The nature of Board review in such cases, therefore, will be limited to determining that the agency has established the following: (1) the requirement of a security clearance for the position in question; (2) the loss or denial of the security clearance; (3) and the granting of minimal due process protections to the employee.

B. *Whether the Board's Scope of Authority Extends to Ordering the Agency to Reinstate the Security Clearance*

Based on the premise that the Board lacks authority to review security clearance determinations, the federal agencies assert in their *amicus* briefs that the Board also lacks authority to order reinstatement of a security clearance. On the other hand, the federal employee unions contend that if the Board can review security clearance decisions, it necessarily follows that the Board may order reinstatement where appropriate.

For the reasons which led the Board to find that it has no authority to review the merits of security clearance determinations, the Board likewise finds that it has no authority to order reinstatement of a security clearance. Ordering reinstatement of a security clearance presumes the trustworthiness of the employee to hold a security clearance. Since the Board has specifically held herein that it lacks the authority to review the agency's security clearance determinations, ordering reinstatement of the security clearance would be clearly inconsistent with that holding.

We therefore hold that the Board's scope of authority does not extend to ordering the agency to reinstate an employee's security clearance.

C. *When an Agency Wishes to Base an Action Listed in 5 U.S.C. § 7512 on the Revocation of a Security Clearance, may it do so Pursuant to 5 U.S.C. § 7513, or is 5 U.S.C. § 7532 the Exclusive Basis for Such Action?*

The *amici* basically agree that an action described in 5 U.S.C. § 7512 and taken pursuant to 5 U.S.C. § 7513 procedures is distinguishable from an action taken under 5 U.S.C. § 7532. They contend that a section 7512 adverse action based on a security clearance determination may not be appropriate for disposition under section 7532.

Under section 7532(a), the head of an agency is empowered to suspend an employee without pay whenever the agency head determines that such action is necessary in the interests of national security. The suspended employee is entitled merely to notification of the reasons for the suspension. In *Cole* v. *Young*, 351 U.S. 536, 546 (1956), the Court held that, absent "an immediate threat of harm to the 'National Security,' " normal removal procedures are adequate, and the summary powers of section 7532 need not be invoked. The Court interpreted the term "national security" to apply "only to those activities of the Government that are directly concerned with the protection of the Nation from internal subversion or foreign aggression, and not those which contribute to the strength of the Nation only through their impact on the general welfare." *Id.* at 544.

The clear implication of the Court's holding in *Cole* is that removals under both sections 7512 and 7532 can be appropriate. The Board's conclusion above, that it will not review the merits of the security clearance determination when reviewing a removal under section 7513 also assumes the existence of such action. We conclude, therefore, that section 7532 is not the exclusive basis for removals based upon security clearance revocations.

II.

A. *If the Board's Authority Does Not Extend to Ordering Reinstatement of the Security Clearance, What Alternative Remedies May the Board Order?*

In the event the Board finds that a security clearance revocation occurred without the minimal procedural due process protections set out above, it must determine the nature of the relief to be afforded. Those *amici* who argue that the Board has no authority to order reinstatement of a security clearance propose that the Board order alternative remedies including: directing the agency to reconsider its

decision in accordance with proper procedures; requiring the agency to search for alternative non-sensitive positions at the same or a lower grade level occupied by the appellant; and compelling the agency to place the appellant in a position which requires no security clearance. The *amici* who contend that the Board has the authority to order reinstatement argue that alternative remedies are inadequate to restore the appellant to the status quo and seriously compromise the Board's remedial authority.

However, consistent with our finding that our jurisdiction is limited to the removal *per se*, and does not extend to the security clearance determination, we hold that where the agency has failed to afford an appellant procedural due process rights in a negative security clearance determination, its action is not in accordance with law, and the appropriate remedy is to reverse the adverse action, and to order the agency to restore the appellant to pay status.[7] *See* 5 U.S.C. § 7701(c)(2)(C). If the agency elects to re-initiate the adverse action based upon the negative security clearance determination, the agency must demonstrate that the position in question required a security clearance, that the security clearance was denied or revoked and that it afforded the employee the minimal due process protections consistent with this Opinion and Order. *See Doe* v. *Casey, supra*, at 1272 (employee removed in violation of agency's procedures ordered returned to administrative leave status, which he occupied prior to removal, until granted procedural due process).

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[7] *Cf. Karpoff* v. *United States*, 142 Ct. Cl. 93, 98 (1958) (upon reversal of its earlier determination that the employee was unsuitable for government service, the Civil Service Commission (the predecessor of the Merit Systems Protection Board) should have either reinstated the employee or restored him to duty). However, *Karpoff* is distinguishable from a security clearance case in two important respects: (1) the Commission in *Karpoff* was acting pursuant to the delegated authority of the employing agency in determining the employee's suitability; and (2) *Karpoff* did not involve the denial or revocation of a security clearance, merely a determination of suitability for federal employment.

APPLICATION

In the instant case, the agency challenged the presiding official's authority to determine the merits of its denial of the security clearance. Consistent with our holding that the Board is without authority to review the merits of security clearance determinations, we find that the presiding official erred in reviewing the merits of the agency's denial of the security clearance.[8] We further find that the agency satisfied its burden of proof consistent with this Opinion and Order.

In this regard, we find that the agency designated appellant's position as non-critical sensitive and thus that the agency established the requirement of a security clearance for the position in question. *See* Affidavit of Richard J. Noreika, Appeal File, Tab 12.

Second, there is no dispute that appellant's security clearance was denied by the agency and that his removal was based on that denial. *See* Agency Exhibits, Tabs 7, 8. The agency's notice of proposed removal dated June 17, 1983, stated in part that "maintenance of a security clearance is a mandatory condition of employment" and that appellant had "not been able to perform the full scope of [his] . . . duties, including not being able to go aboard the submarines," because of his lack of a security clearance. Agency Exhibit, Tab 7. The notice further stated that reassignment was not possible because there were no other positions in the facility which did not require access to classified materials and that, based on the nature of the facility's mission, "it would not be possible to restructure or sanitize the job environment to eliminate the requirement for a security clearance." *Id.* The agency's decision letter reiterated these reasons for appellant's removal based on his failure to meet the requirements of his position and further stated that there was "no viable appropriate remedy other than removal." *See* Agency Exhibits, Tabs 8, 12.

Third, the record establishes that appellant was given due process protections consisting of notice of the denial of the security clearance, a statement of reasons for the denial, and an opportunity to be heard. By notice dated February 16, 1983, the agency informed appellant that it intended to deny his security clearance. *See* Agency Exhibit, Tab 5. In the notice, the agency stated as the bases for its action, court and police records,[9] which indicated that appellant had a lengthy history of problems with the law, and appellant's signed, sworn statement, which he furnished during an interview with a special agent of the Defense Investigative Service. *Id.* Also, in the notice the agency provided appellant with an opportunity to reply to the proposed denial of his security clearance. *Id.* Appellant availed himself of that opportunity and submitted evidence in support of his explanation of the incidents cited in the agency notice, character references, and certificates indicating his participation in alcoholic recovery programs.[10] *See* attachments to petition for appeal, Tab 1.

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[8] Because of this finding, we deem it unnecessary to address the agency's remaining allegations of error by the presiding official.

[9] Those records showed that for the period extending from 1966 to 1982, appellant was charged with a series of offenses including: driving with a suspended or revoked license; possession of stolen property; carrying a concealed weapon; carrying a loaded firearm; disturbing the peace, resisting arrest; assault; battery; disorderly conduct; failure to comply with a court order; and failure to appear at a court proceeding. Appellant was convicted of several of those offenses and served terms of imprisonment.

[10] Although appellant submitted evidence indicating that he was a recovered alcoholic, appellant did not assert the affirmative defense of

The agency letter of May 27, 1983, notified appellant of its determination that he was not eligible to occupy a sensitive position and of its decision to deny the security clearance. *Id.* It further notified appellant of his right to appeal that decision to higher level agency authority. *Id.*

We therefore find that the agency has sustained the reasons for its action by a preponderance of the evidence and that the removal action would promote the efficiency of the service.

Accordingly, the initial decision is REVERSED, and the agency's removal action is SUSTAINED.

This is the final order of the Merit Systems Protection Board in this appeal. 5 C.F.R. § 1201.113(c).

The appellant is hereby notified of the right under 5 U.S.C. § 7703 to seek judicial review, if the court has jurisdiction, of the Board's action by filing a petition for review in the United States Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D.C. 20439. The petition for judicial review must be received by the court no later than (30) days after the appellant's receipt of this order.

FOR THE BOARD:

/s/ROBERT E. TAYLOR
Robert E. Taylor
Clerk of the Board

Washington, D.C.

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handicap discrimination based on alcoholism, and the agency based neither the security clearance denial nor the removal action on that condition. Therefore, we are not presented with the issue of handicap discrimination.

APPENDIX C

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
SEATTLE REGIONAL OFFICE

Case No. SE07528310257

THOMAS M. EGAN, APPELLANT,

v.

DEPARTMENT OF THE NAVY, RESPONDENT.

Date: DEC 22 1983

DECISION

Appellant Thomas Egan was removed from his position as a Labor Leader with the Trident Naval Facility on July 22, 1983, and subsequently timely appealed to the Merit Systems Protection Board (the "Board") on August 11, 1983. Appellant did not request a hearing and the record was closed on November 17, 1983.

For the reasons explained herein, respondent's decision to remove appellant is REVERSED.

ANALYSES AND FINDINGS

Appellant was hired on November 29, 1981, "subject to satisfactory completion of security and medical reports."[1] On April 18, 1982, appellant was promoted to the position of Labor Leader which was designated as a "non-critical-sensitive position."[2] Appellant's security clearance was denied on May 23, 1983, and he was subsequently removed based on his "failure to meet his job requirements."[3] The evidence submitted indicated that appellant's actual removal was taken pursuant to 5 U.S.C. § 7512 and not under 5 U.S.C. § 7532 which pertains to suspensions and removals for national security reasons. After being removed, appellant appealed the agency's decision to rescind his security clearance and its decision to remove him.[4]

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[1] *See* Respondent's Exhibit ("R.Ex.") 2.

[2] Position descriptions are characterized as critical-sensitive; noncritical-sensitive, or non-sensitive. *See* R.Ex. 1, p. 16-2. *See also* "Affidavit of Fact" by Richard J. Noreika, R.Ex. 12.

Respondent argued that the Board lacked jurisdiction over the issue of the appropriateness of the revocation of appellant's security clearance. According to respondent the only issue before the Board was whether appellant had met the job requirements of his position description. Contrary to respondent's assertion, I find that the Board does have the authority to review the propriety of respondent's revocation of appellant's security classification in connection with its review of appellant's removal. This issue was clearly addressed in the recent case of *Bogdanowicz v. Department of the Army,* MSPB Docket No. PH0752811057 (September 27, 1983), adopting the reasoning in, *Hoska v. United States Department of the Army,* MSPB Docket No. PH07528110029 (Jan. 29, 1981), *rev'd on other grounds,* 677 F.2d 131 (D.C. Cir. 1982).

While the *Bogdanowicz* case defined the scope of the Board's jurisdiction to include a review of the propriety of a denial of a security clearance, there was no analysis of the bases used to determine whether the denial was proper.[5] As a logical first step the agency must initially establish the standard for obtaining a security clearance by showing the specific criteria used to determine whether to deny, grant, or revoke the security clearance. Additionally, in order to avoid arbitrary or perfunctory decisions, it must show that these criteria are rationally related with those concerns connected with our national security. *See Schwartz v. United States Department of the Army,* MSPB Docket No. NY07528110226, at 4 (September 27, 1983), citing *Hoska,* at 138. Any subsequent investigation of an employee should be evaluated within the framework of these criteria. As a result of its investigation an agency must be able to show how an employee's alleged misconduct has an actual or potentially detrimental effect on national security interests. The final decision made on the basis of such an evaluation must be "reasonable and warranted." *Schwartz,* at 4.

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[3] R.Ex. 8.

[4] *See* "Appellant's Petition of Appeal", filed August 11, 1983.

[5] In *Bogdanowicz* the Board remanded the case to the Regional Office to allow both parties an opportunity to submit additional evidence on the propriety of the security clearance revocation.

In *Schwartz* the Board found that an agency must show by a preponderance of the evidence that the employee acts precipitating the revocation decision actually occurred. Once that evidence is established then the agency must persuade the Board that the final decision to revoke the security clearance was reasonable. To determine the parameters of "reasonableness" I turn to the Board's conclusions in an analogous situation concerning review of an agency's adverse action determination. Pursuant to *Douglas v. Veterans Administration,* 5 MSPB 313, 333 (1981), the Board's review of an agency's imposed penalty is limited to determining whether the agency selected a penalty only after the relevant factors had been conscientiously weighed and assuring that the agency in choosing the penalty struck a reasonable balance within the limits of reasonableness. In adverse action cases the Board has specifically found that when reviewing the appropriateness of a penalty the Board cannot merely substitute its judgment for that of the agency. *See Snipes v. United States Postal Service,* 6 MSPB 16 (1981).

Applying the Board's analysis in *Douglas* to the instant situation, I find in order to show its judgment was within the limits of reasonableness, the agency must show that it conscientiously weighed the circumstances surrounding the employee's alleged misconduct, against the interests of national security.[6] I also conclude that while the agency must prove by a preponderance of the evidence that the factual considerations underlying its decision actually occurred, the preponderance standard does not apply to the agency's final decision itself, which involves the exercise of judgment and discretion. *See Douglas,* at 325. However, the ultimate burden is upon the agency to persuade the Board of the appropriateness of its decision to deny or revoke an employee's security clearance.

In this case, it is impossible to analyze whether the agency's final decision was "reasonable." The agency failed to even establish what specific criteria are used to determine whether to deny, grant, or revoke an employee's security clearance, or to prove that such criteria are rationally related to our national security. Unlike the Department of the Army in *Hoska,* respondent did not submit any body of regulations revealing what factors were used as a basis for the determination to deny appellant's security clearance.[7] The only regulatory information submitted by respondent merely indicated that "certain activities and associations, current or past of varying degrees of

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[6] Thus, the idea of "nexus" comes into play in two contexts. First, there must be a rational relationship between the general criteria used to deny a security clearance and the interests of national security. Second, there must be a rational relationship between an employee's specific misconduct and its actual or potentially detrimental effect on national security interests.

[7] In *Hoska,* at 136, the Department of the Army submitted a regulation which listed twenty-three factors which "may depending upon the degree of seriousness, be the basis for denial of access to classified defense information, or revocation of clearance."

seriousness, warrant an appropriate investigation and careful consideration"[8] In this same regulation, these "certain activities" were defined as, "commission of any act of sabotage, espionage, treason, terrorism, [o]r sedition . . . ."[9] Additionally, respondent submitted no evidence showing that appellant's conduct was evaluated within some framework of regulations related to the national security. Finally, respondent failed to present any evidence showing it conscientiously weighed the circumstances surrounding appellant's alleged misconduct and reasonably balanced it against the interests of national security.[10]

Respondent was informed by two Board Orders, both dated October 18, 1983, about the ruling in the recent case of *Bogdanowicz v. Department of the Army.* Additionally, respondent was specifically advised that "every material element of this case must be established by a preponderance of the evidence. *In re Sciver,* 1 MSPB 94 (1979); *see also Powell v. United States Department of the Interior,* 3 MSPB 35 (1980), delineating what documents constitute 'evidence.' " Although informed of its burden of proof, respondent relied on allegations and explanations of the agency's behavior as contained in the notice of proposed revocation of appellant's security clearance. I find that those statements in the proposed and final decision letter constitute mere allegations which the agency is required to support, as previously discussed, by a preponderance of the evidence. Therefore, I did not consider such letters as "evidence." I also did not consider as "evidence" those statements contained in respondent's brief. In its brief, respondent alluded to facts not substantiated by the record and attempted to introduce new information as evidence.[11]

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[8] *See* R.Ex. 1, pg. 16-3, "Regulations 16.102 Security Criteria."

[9] *See* R.Ex. 1, pg. 16-3.

[10] The record reveals several facts which would have to be analyzed before finding that the agency conscientiously weighed the circumstances surrounding appellant's alleged misbehavior. *E.g.* whether appellant actually "concealed" anything on his SF-171; whether the offenses appellant was arrested for and subsequently found not guilty were considered as proof of his misbehavior; and whether the numerous statements from appellant's supervisors, concerning their feelings about appellant's past behavior and the interests of national security were considered.

Based on the evidence submitted I find respondent has failed to show it reached a reasonable and warranted decision concerning the propriety of the revocation of appellant's security clearance. Since respondent has failed to prove the propriety of its action to deny appellant his security clearance, it has correspondingly failed to prove that the basis of appellant's subsequent removal was within reason. The evidence showed that the only basis for appellant's termination was his lack of security clearance, therefore respondent's decision to remove appellant cannot stand.

DECISION

Accordingly, respondent's decision to remove appellant for "failure to meet the requirements of your positions due to denial of your security clearance" is reversed.

APPEAL RIGHTS

This is an initial decision. It will become a final decision of the Merit Systems Protection Board on JAN 26 1984 unless a petition for review is filed with the Board or the Board opens the case on its own motion. If a petition for review is filed (see below), an informational copy of it should be forwarded to this office.

Any party to the proceeding, the Director of OPM, and the Special Counsel may file a petition for review. The Director may request review only if he/she is of the opinion that the decision is erroneous and will have a substantial impact on any civil service law, rule, or regulation under the jurisdiction of the Office of Personnel Management. The Board may grant a petition for review, after providing an opportunity for response by other parties, when it is established that:

(1) New and material evidence is available that, despite due diligence, was not available when the record was closed; or

(2) The decision of the presiding official is based on an erroneous interpretation of statue or regulation.

All petitions for review shall set forth objections to the initial decision, supported by references to applicable laws or regulations, and with specific reference to the record. The petition for review must be filed with the Secretary of the Merit Systems Protection Board, Washington, D.C., 20419, no later than JAN 26 1984. Three copies of the petition must be filed with the Secretary.

Any appellant adversely affected or aggrieved by the Board's final decision may obtain judicial review by filing a petition with the U.S. Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D.C. 20439. Such a petition may not be filed while the case is pending before the Board. To be timely, the petition for judicial review must be received by the Court within 30 days of the final Board decision. 5 U.S.C. § 7703(B)(1).

ENFORCEMENT

Any party seeking enforcement of a final decision must file a petition for enforcement with this office in accordance with 5 C.F.R. § 1201.181.

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[11] *See* respondent's brief filed November 17, 1983.

ATTORNEY FEES

When the appellant has prevailed, (s)he may request payment of attorney fees. Any such request must be filed with this office within 10 days of the date this decision becomes final. 5 C.F.R. § 1201.37.

For the Board:

/s/ JULIE L. KEBLER
Julie L. Kebler
Presiding Official

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Appeal No. 86-579
MSPB Docket No. SE07528310257

THOMAS E. EGAN, PETITIONER,

v.

DEPARTMENT OF THE NAVY, RESPONDENT.

JUDGMENT

ON APPEAL from the MERIT SYSTEMS PROTECTION BOARD *in CASE NO(S).* SE07528310257 *This CAUSE having been heard and considered, it is ORDERED and ADJUDGED: VACATED AND REMANDED.*

ENTERED BY ORDER OF THE COURT

Dated Oct 1 1986
/s/ FRANCIS X. GINDHART
Francis X. Gindhart, Clerk

ISSUED AS A MANDATE: DEC 3 1986
COSTS: Against, Respondent.

PRINTING	$148.20
TOTAL	$148.20

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Appeal No. 86-579
MSPB Docket No. SE07528310257

THOMAS E. EGAN, PETITIONER,

v.

DEPARTMENT OF THE NAVY, RESPONDENT.

ORDER

A suggestion for rehearing in banc having been filed in this case,

UPON CONSIDERATION THEREOF, it is

ORDERED that the suggestion for rehearing in banc is declined.

/s/ FRANCIS X. GINDHART
Francis X. Gindhart, Clerk

Date 12/8/86

cc: Mr. William J. Nold
Mr. Robert A. Reuteshan, DOJ
Mr. Stuart A. Karsch

APPENDIX F

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT CORRECTED COPY

Appeal No. 86-579
MSPB Docket No. SE07528310257

THOMAS E. EGAN, PETITIONER,

v.

DEPARTMENT OF THE NAVY, RESPONDENT.

Before MARKEY, *Chief Judge,* NEWMAN, *Circuit Judge,* and SWYGERT, *Senior Circuit Judge.**

ORDER

A petition for rehearing having been filed in this case,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, denied.

The suggestion for rehearing in banc is under consideration.

/s/ FRANCIS X. GINDHART
Francis X. Gindhart, Clerk

Date 11/26/86

cc: Mr. William J. Nold
Mr. Robert A. Reutershan, DOJ
Mr. Stuart A. Karsch

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*The Honorable Luther M. Swygert, Senior Circuit Judge, United States Court of Appeals for the Seventh Circuit, sitting by designation. 28 U.S.C. Sec. 291 (1982).

APPENDIX G

§ 7512. Actions covered

This subchapter applies to—

(1) a removal;

(2) a suspension for more than 14 days;

(3) a reduction in grade;

(4) a reduction in pay; and

(5) a furlough of 30 days or less;

but does not apply to—

(A) a suspension or removal under section 7532 of this title,

(B) a reduction-in-force action under section 3502 of this title,

(C) the reduction in grade of a supervisor or manager who has not completed the probationary period under section 3321(a)(2) of this title if such reduction is to the grade held immediately before becoming such a supervisor or manager,

(D) a reduction in grade or removal under section 4303 of this title, or

(E) an action initiated under section 1206 or 7521 of this title.

§ 7513. Cause and procedure

(a) Under regulations prescribed by the Office of Personnel Management, an agency may take an action covered by this subchapter against an employee only for such cause as will promote the efficiency of the service.

(b) An employee against whom an action is proposed is entitled to—

(1) at least 30 days' advance written notice, unless there is reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed, stating the specific reasons for the proposed action;

(2) a reasonable time, but not less than 7 days, to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer;

(3) be represented by an attorney or other representative; and

(4) a written decision and the specific reasons therefor at the earliest practicable date.

(c) An agency may provide, by regulation, for a hearing which my be in lieu of or in addition to the opportunity to answer provided under subsection (b)(2) of this section.

(d) An employee against whom an action is taken under this section is entitled to appeal to the Merit Systems Protection Board under section 7701 of this title.

(e) Copies of the notice of proposed action, the answer of the employee when written, a summary thereof when made orally, the notice of decision and reasons therefor, and any order effecting an action covered by this subchapter, together with any supporting material, shall be maintained by the agency and shall be furnished to the Board upon its request and to the employee affected upon the employee's request.

§ 7532. Suspension and removal

(a) Notwithstanding other statutes, the head of an agency may suspend without pay an employee of his agency when he considers that action necessary in the interests of national security. To the extent that the head of the agency determines that the interests of national security permit, the suspended employee shall be notified of the reasons for the suspension. Within 30 days after the notification, the suspended employee is entitled to submit to the official designated by the head of the agency statements or affidavits to show why he should be restored to duty.

BEST AVAILABLE COPY

(b) Subject to subsection (c) of this section, the head of an agency may remove an employee suspended under subsection (a) of this section when, after such investigation and review as he considers necessary, he determines that removal is necessary or advisable in the interests of national security. The determination of the head of the agency is final.

(c) An employee suspended under subsection (a) of this section who—

(1) has a permanent or indefinite appointment;

(2) has completed his probationary or trial period; and

(3) is a citizen of the United States;

is entitled, after suspension and before removal, to—

(A) a written statement of the charges against him within 30 days after suspension, which may be amended within 30 days thereafter and which shall be stated as specifically as security considerations permit;

(B) an opportunity within 30 days thereafter, plus an additional 30 days if the charges are amended, to answer the charges and submit affidavits;

(C) a hearing, at the request of the employee, by an agency authority duly constituted for this purpose;

(D) a review of his case by the head of the agency or his designee, before a decision adverse to the employee is made final; and

(E) a written statement of the decision of the head of the agency.

§ 7701. Appellate procedures

(a) An employee, or applicant for employment, may submit an appeal to the Merit Systems Protection Board from any action which is appealable to the Board under any law, rule, or regulation. An appellant shall have the right—

(1) to a hearing for which a transcript will be kept; and

(2) to be represented by an attorney or other representative. Appeals shall be processed in accordance with regulations prescribed by the Board.

(b) The Board may hear any case appealed to it or may refer the case to an administrative law judge appointed under section 3105 of this title or other employee of the Board designated by the Board to hear such cases, except that in any case involving a removal from the service, the case shall be heard by the Board, an employee experienced in hearing appeals, or an administrative law judge. The Board, administrative law judge, or other employee (as the case may be) shall make a decision after receipt of the written representations of the parties to the appeal and after opportunity for a hearing under subsection (a)(1) of this section. A copy of the decision shall be furnished to each party to the appeal and to the Office of Personnel Management.

(c)(1) Subject to paragraph (2) of this subsection, the decision of the agency shall be sustained under subsection (b) only if the agency's decision—

(A) in the case of an action based on unacceptable performance described in section 4303 of this title, is supported by substantial evidence, or

(B) in any other case, is supported by a preponderance of the evidence.

[redacted]

EXECUTIVE ORDER No. 10450. SECURITY REQUIREMENTS FOR GOVERNMENT EMPLOYEES

Ex. Ord. No. 10450, Apr. 27, 1953, 18 F.R. 2489, as amended by Ex. Ord. No. 10491, Oct. 15, 1953, 18 F.R. 6583; Ex. Ord. No. 10531, May 27, 1954, 19 F.R. 3069;

Ex. Ord. No. 10548, Aug. 3, 1954, 19 F.R. 4871; Ex. Ord. No. 10550, Aug. 6, 1954, 19 F.R. 4981; Ex. Ord. No. 11605, July 2, 1971, 36 F.R. 12831; Ex. Ord. No. 11785, June 4, 1974, 39 F.R. 20053; Ex. Ord. No. 12107, Dec. 28, 1978, 44 F.R. 1055, provided:

WHEREAS the interests of the national security require that all persons privileged to be employed in the departments and agencies of the Government shall be reliable, trustworthy, of good conduct and character, and of complete and unswerving loyalty to the United States; and

WHEREAS the American tradition that all persons should receive fair, impartial, and equitable treatment at the hands of the Government requires that all persons seeking the privilege of employment or privileged to be employed in the departments and agencies of the Government be adjudged by mutually consistent and no less than minimum standards and procedures among the departments and agencies governing the employment and retention in employment of persons in the Federal service:

NOW, THEREFORE, by virtue of the authority vested in me by the Constitution and statutes of the United States, including section 1753 of the Revised Statutes of the United States (5 U.S.C. 631) [sections 3301 and 7301 of this title]; the Civil Service Act of 1883 (22 Stat. 403; 5 U.S.C. 632, et seq.) [section 1101 et seq. of this title]; section 9A of the act of August 2, 1939, 53 Stat. 1148 (5 U.S.C. 118j) [sections 3333 and 7311 of this title]; and the act of August 26, 1950, 64 Stat. 476 (5 U.S.C. 22-1, et seq.) [section 7501 et seq. of this title], and as President of the United States, and deeming such action necessary in the best interests of the national security it is hereby ordered as follows:

SECTION 1. In addition to the departments and agencies specified in the said act of August 26, 1950, and Executive Order No. 10237 of April 26, 1951 the provisions of that act shall apply to all other departments and agencies of the Government.

SEC. 2. The head of each department and agency of the Government shall be responsible for establishing and maintaining within his department or agency an effective program to insure that the employment and retention in employment of any civilian officer or employee within the department or agency is clearly consistent with the interests of the national security.

SEC. 3. (a) The appointment of each civilian officer or employee in any department or agency of the Government shall be made subject to investigation. The scope of the investigation shall be determined in the first instance according to the degree of adverse effect the occupant of the position sought to be filled could bring about, by virtue of the nature of the position, on the national security, but in no event shall the investigation include less than a national agency check (including a check of the fingerprint files of the Federal Bureau of Investigation), and written inquiries to appropriate local law enforcement agencies, former employers and supervisors, references, and schools attended by the person under investigation: Provided, that upon request of the head of the department or agency concerned, the Office of Personnel Management may, in its discretion, authorize such less investigation as may meet the requirements of the national security with respect to per-diem, intermittent, temporary, or seasonal employees, or aliens employed outside the United States. Should there develop at any stage of investigation information indicating that the employment of any such person may not be clearly consistent with the interests of the national security there shall be conducted with respect to such person a full field investigation, or such less investigation as shall be sufficient to enable the head of the department or agency concerned to determine whether retention of such person is clearly consistent with the interests of the national security.

(b) The head of any department or agency shall designate, or cause to be designated, any position within his department or agency the occupant of which could bring about, by virtue of the nature of the position, a material adverse effect on the national security as a sensitive position. Any position so designated shall be filled or occupied only be a person with respect to whom a full field investigation has been conducted: Provided, that a person occupying a sensitive position at the time it is designated as such may continue to occupy such position pending the completion of a full field investigation, subject to the other provisions of this order: And provided further, that in case of emergency a sensitive position may be filled for a limited period by a person with respect to whom a full field pre-appointment investigation has not been completed if the head of the department or agency concerned finds that such action is necessary in the national interest, which finding shall be made a part of the records of such department or agency.

SEC. 4. The head of each department and agency shall review, or cause to be reviewed, the cases of all civilian officers and employees with respect to whom there has been conducted a full field investigation under Executive Order No. 9835 of March 21, 1947, and, after such further investigation as may be appropriate, shall re-adjudicate, or cause to be re-adjudicated, in accordance with the said act of August 26, 1950, such of those cases as have not been adjudicated under a security standard commensurate with that established under this order.

SEC. 5. Whenever there is developed or received by any department or agency information indicating that the retention in employment of any officer or employee of the Government may not be clearly consistent with the interests of the national security, such information shall be forwarded to the head of the employing department or agency or his representative, who, after such investigation as may be appropriate, shall review, or cause to be reviewed, and, where necessary, re-adjudicate, or cause to be re-adjudicated, in accordance with the said act of August 26, 1950, the case of such officer or employee.

SEC. 6. Should there develop at any stage of investigation information indicating that the employment of any officer or employees of the Government may not be clearly consistent with the interests of the national security, the head of the department or agency concerned or his representative shall immediately suspend the employment of the person involved if he deems such suspension necessary in the interests of the national security and, following such investigation and review as he deems necessary the head of the department or agency concerned shall terminate the employment of such suspended officer in the interests of the national security, or employee whenever he shall determine such termination necessary or advisable in accordance with the said act of August 26, 1950.

SEC. 7. Any person whose employment is suspended or terminated under the authority granted to heads of departments and agencies by or in accordance with the said act of August 26, 1950, or pursuant to the said Executive Order No. 9835 or any other security or loyalty program relating to officers or employees of the Government, shall not be reinstated or restored to duty or reemployed in the same department or agency and shall not be reemployed in any other department or agency, unless the head of the department or agency concerned finds that such reinstatement, restoration, or reemployment is clearly consistent with the interests of the national security, which finding shall be made a part of the records of such department or agency: Provided, that no person whose employment has been terminated under such authority thereafter may be employed by any other department or agency except after a determination by the Office of Personnel Management that such person is eligible for such employment.

SEC. 8. (a) The investigations conducted pursuant to this order shall be designed to develop information as to whether the employment or retention in employment in the Federal service of the person being investigated is clearly consistent with the interests of the national security. Such information shall relate, but shall not be limited, to the following:

(1) Depending on the relation of the Government employment to the national security:

(i) Any behavior, activities, or associations which tend to show that the individual is not reliable or trustworthy.

(ii) Any deliberate misrepresentations, falsifications or omissions of material facts.

(iii) Any criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct, habitual use of intoxicants to excess, drug addiction or sexual perversion.

(iv) Any illness, including any mental condition, of a nature which in the opinion of competent medical authority may cause significant defect in the judgment or reliability of the employee, with due regard to the transient or continuing effect of the illness and the medical findings in such case.

(v) Any facts which furnish reason to believe that the individual may be subjected to coercion, influence, or pressure which may cause him to act contrary to the best interests of the national security.

(2) Commission of any act of sabotage, espionage, treason, or sedition, or attempts thereat or preparation therefor, or conspiring with, or aiding or abetting another to commit or attempt to commit any act of sabotage, espionage, treason, or sedition.

(3) Establishing or continuing a sympathetic association with a saboteur, spy, traitor, seditionist, anarchist, or revolutionist, or with any espionage or other secret agent or representative of a foreign nation, or any representative of a foreign nation whose interests may be inimical to the interests of the United States, or with any person who advocates the use of force or violence to overthrow the government of the United States or the alteration of the form of government of the United States by unconstitutional means.

(4) Advocacy of use of force or violence to overthrow the government of the United States, or of the alteration of the form of government of the United States by uncon-situtional means.

(5) Knowing membership with the specific intent of furthering the aims of, or adherence to and active participation in, any foreign or domestic organization, association, movement, group, or combination of persons (hereinafter referred to as organizations) which unlawfully advocates or practices the commission of acts of force or violence to prevent others from exercising their rights under the Constitution or laws of the United States or of any State, or which seeks to overthrow the Government of the United States or any State or subdivision thereof by unlawful means.

(6) Intentional unauthorized disclosure to any person of security information, or of other information disclosure of which is prohibited by law, or willful violation or disregard of security regulations.

(7) Performing or attempting to perform his duties, or otherwise acting, so as to serve the interests of another government in preference to the interests of the United States.

(8) Refusal by the individual, upon the ground of constitutional privilege against self-incrimination, to testify before a congressional committee regarding charges of his alleged disloyalty or other misconduct.

(b) The investigation of persons entering or employed in the competitive service shall primarily be the responsibility of the Office of Personnel Management, except in cases in which the head of a department or agency assumes that responsibility pursuant to law or by agreement with the Office. The Office shall furnish a full investigative report to the department or agency concerned.

(c) The investigation of persons (including consultants, however employed), entering employment of, or employed by, the Government other than in the competitive service shall primarily be the responsibility of the employing department or agency. Departments and agencies without investigative facilities may use the investigative facilities of the Office of Personnel Management, and other departments and agencies may use such facilities under agreement with the Office.

(d) There shall be referred promptly to the Federal Bureau of Investigation all investigations being conducted by any other agencies which develop information indicating that an individual may have been subjected to coercion, influence, or pressure to act contrary to the interests of the national security, or information relating to any of the matters described in subdivisions (2) through (8) of subsection (a) of this section. In cases so referred to it, the Federal Bureau of Investigation shall make a full field investigation.

SEC. 9. (a) There shall be established and maintained in the Office of Personnel Management a security-investigations index covering all persons as to whom security investigations have been conducted by any department or agency of the Government under this order. The central index established and maintained by the Office under Executive Order No. 9835 of March 21, 1947, shall be made a part of the security-investigations index. The security-investigations index shall contain the name of each person investigated, adequate identifying information concerning each such person, and a reference to each department and agency which has conducted an investigation concerning the person involved or has suspended or terminated the employment of such person under the authority granted to heads of departments and agencies by or in accordance with the said act of August 26, 1950.

(b) The heads of all departments and agencies shall furnish promptly to the Office of Personnel Management information appropriate for the establishment and maintenance of the security-investigations index.

(c) The reports and other investigative material and information developed by investigations conducted pursuant to any statute, order, or program described in section 7 of this order shall remain the property of the investigative agencies conducting the investigations, but may, subject to considerations of the national security, be retained by the department or agency concerned. Such reports and other investigative material and information shall be maintained in confidence, and no access shall be given thereto except with the consent of the investigative agency concerned, to other departments and agencies conducting security programs under the authority granted by or in accordance with the said act of August 26, 1950, as may be required for the efficient conduct of Government business.

SEC. 10. Nothing in this order shall be construed as eliminating or modifying in any way the requirement for any investigation or any determination as to security which may be required by law.

SEC. 11. On and after the effective date of this order the Loyalty Review Board established by Executive Order No. 9835 of March 21, 1947, shall not accept agency findings for review, upon appeal or otherwise. Appeals pending before the Loyalty Review Board on such date shall be heard to final determination in accordance with the provisions of the said Executive Order No. 9835, as amended.

Agency determinations favorable to the officer or employee concerned pending before the Loyalty Review Board on such date shall be acted upon by such Board, and whenever the Board is not in agreement with such favorable determination the case shall be remanded to the department or agency concerned for determination in accordance with the standards and procedures established pursuant to this order. Cases pending before the regional loyalty boards of the Office of Personnel Management on which hearings have not been initiated on such date shall be referred to the department or agency concerned. Cases being heard by regional loyalty boards on such date shall be heard to conclusion, and the determination of the board shall be forwarded to the head of the department or agency concerned: Provided, that if no specific department or agency is involved, the case shall be dismissed without prejudice to the applicant. Investigations pending in the Federal Bureau of Investigation or the Office of Personnel Management on such date shall be completed, and the reports thereon shall be made to the appropriate department or agency.

SEC. 12. Executive Order No. 9835 of March 21, 1947, as amended, is hereby revoked.

SEC. 13. The Attorney General is requested to render to the heads of departments and agencies such advice as may be requisite to enable them to establish and maintain an appropriate employee-security program.

SEC. 14. (a) The Office of Personnel Management, with the continuing advice and collaboration of representatives of such departments and agencies as the National Security Council may designate, shall make a continuing study of the manner in which this order is being implemented by the departments and agencies of the Government for the purpose of determining:

(1) Deficiencies in the department and agency security programs established under this order which are inconsistent with the interests of or directly or indirectly weaken, the national security.

(2) Tendencies in such programs to deny to individual employees fair, impartial and equitable treatment at the hands of the Government, or rights under the Constitution and laws of the United States or this order.

Information affecting any department or agency developed or received during the course of such continuing study shall be furnished immediately to the head of the department or agency concerned. The Office of Personnel Management shall report to the National Security Council, at least semiannually, on the results of such study, shall recommend means to correct any such deficiencies or tendencies, and shall inform the National Security Council immediately of any deficiency which is deemed to be of major importance.

(b) All departments and agencies of the Government are directed to cooperate with the Office of Personnel Management to facilitate the accomplishment of the responsibilities assigned to it by subsection (a) of this section.

(c) To assist the Office of Personnel Management in discharging its responsibilities under this order, the head of each department and agency shall, as soon as possible and in no event later than ninety days after receipt of the final investigative report on a civilian officer or employee subject to a full field investigation under the provisions of this order, advise the Office as to the action taken with respect to such officer or employee. The information furnished by the heads of departments and agencies pursuant to this section shall be included in the reports which the Office of Personnel Management is required to submit to the National Security Council in accordance with subsection (a) of this section. Such reports shall set forth any deficiencies on the part of the heads of departments and agencies in taking timely action under this order, and shall mention specifically any instances of noncompliance with this subsection.

SEC. 15. This order shall become effective thirty days after the date hereof.

U.S. GOVERNMENT PRINTING OFFICE: 1987 — 181-483/40254

OPPOSITION
BRIEF

(8)

Supreme Court, U.S.
FILED
MAY 7 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1552

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

DEPARTMENT OF THE NAVY, Petitioner

versus

THOMAS E. EGAN

BRIEF IN OPPOSITION TO WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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17 pp

QUESTION PRESENTED

Whether, in the course of reviewing the removal of an employee for failure to maintain a required security clearance, the Merit Systems Protection Board is authorized by statute to review the substance of the underlying decision to deny or revoke the security clearance.

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No. 86-1552

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

DEPARTMENT OF THE NAVY, Petitioner

versus

THOMAS E. EGAN

BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

The Solicitor General, on behalf of the Department of the Navy, has petitioned for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

The undersigned, on behalf of Thomas E. Egan, Respondent, opposes the Petition.

OPINIONS BELOW

The opinion of the Court of Appeals (Petitioner's Appendix, 1a-42a) is reported at 802 F. 2d 1563. The opinion of the Merit Systems Protection Board (Petitioner's Appendix, 43a-60a) is reported at 28 M.S.P.R. 509. The earlier decision by a presiding official of the MSPB (Petitioner's Appendix, 61a-68a) is unreported.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions, 5 U.S.C. §§ 7512, 7513, 7532 and 7701, are set forth in Petitioner's Appendix G at 72a-75a.

Additional pertinent statutory provisions, 5 U.S.C. §§ 1205 and 7501 are set forth in Respondent's Appendix, at 1a-6a.

STATEMENT

1. The facts are stated in the decision of the United States Court of Appeals for the Federal Circuit (Petitioner's Appendix A at 1a-25a).

2. In addition to the facts as cited below, and by way of clarification, it must be pointed out that Respondent, Egan, *was not* in a probationary status at the time of his removal and for all purposes regarding this case, Egan was an "employee" within the meaning of 5 U.S.C. § 7501(1).

ARGUMENT

Egan was removed from his position because he did not, in the judgment of the Petitioner, qualify for a proper security clearance. When national security is involved, an employee may be removed from federal service, under two different statutory provisions; each having its own distinct procedural safeguards.

5 U.S.C. §§ 7511-7514

5 U.S.C. § 7513(a) permits an agency such as the Department of the Navy to remove an employee "only for such cause as will promote the efficiency of the service." Prior to removal, certain minimal due process procedures are afforded, but a *pre-removal hearing* is not mandated. On the other hand, an employee removed pursuant to Section 7513 is "entitled to appeal to the Merit Systems Protection Board," 5 U.S.C. § 7513(d). 5 U.S.C. § 1205 provides that the Merit Systems Protection Board (MSPB) *shall,* "hear, adjudicate, or provide for the hearing or adjudication of all matters within" its jurisdiction (5 U.S.C. § 1205 (a)(1)).

5 U.S.C. §§ 7531-7533

Notwithstanding, the ability for an agency to remove an employee for "such cause," 5 U.S.C. § 7532(b) permits an agency such as the Department of the Navy to remove an employee when it determines "that removal is necessary or advisable in the interest of national security." The decision to remove a federal employee under this statute is final and no appeal is permitted to the Merit Systems Protection Board, or any other administrative body. Prior to removal, certain minimal due process procedures, *including a hearing,* are afforded an employee suspended under this section.

Significantly, the Department of the Navy chose to remove Egan under the provisions of Section 7513 ("such cause") and not Section 7532 ("National Security") of Title V.

In reviewing Egan's removal, the Merit Systems Protection Board attempted to abdicate its statutory mandate to "hear and adjudicate" by limiting its scope of review on appeal. It is this abdication that the Federal Circuit found to be erroneous.

Petitioner seeks a writ of certiorari because (1) the Federal Circuit decision is dispositive of the issue; (2) national security interests are involved; (3) the issue will frequently arise in MSPB proceedings.

Supreme Court Rule 17 deals with considerations governing review on certiorari. The Federal Circuit is the only circuit to which a final decision of the MSPB can now be appealed. Consequently, the decision below is not now, nor will it in the future, be in conflict with other circuits.

The fact that the decision below is dispositive of the issue, or that the issue will frequently arise in MSPB proceedings, hardly seems an adequate basis to grant certiorari.

The Department of the Navy also claims that certiorari should be granted because national security interests are involved. The Navy made the original choice to remove Egan pursuant to statutes that *do not* relate to national security. The Court below has interpreted the relevant statutes in a complete and proper manner. If an agency, such as the Department of the Navy, has a basis for removing a federal employee on national security grounds and wishes to avoid MSPB review, then it should remove the employee under 5 U.S.C. §§ 7531, et seq. The procedures under these sections do not afford MSPB review and permit the removal of the employee when "he [head of an agency] determines that removal is necessary or advisable in the interest of national security." 5 U.S.C. § 7532(b)

CONCLUSION

Congress created the review role of the Merit Systems Protection Board. The attempt by the Board to narrow its scope of review in this case is not in accordance with the clear meaning of the appropriate statute. As such, the Court below was absolutely correct in stating:

> "We conclude that the heavy weight of law and precedent, congressional intent, and fundamental rights, require that the agency actions taken in *Egan* receive the same appellate review as other adverse actions taken under 5 U.S.C. § 7512."

The question presented in this case is narrow. It involves an interpretation of those statutes that control the substantive basis, procedures and scope of review of actions involving the removal of federal employees.

The Court of Appeals decision below correctly considered the question presented by the parties and no amount of retoric can convert this case into one warranting review on certiorari.

It is requested that the Petition be denied.

Respectfully submitted,

William J. Nold
Attorney for Thomas E. Egan

May, 1987

APPENDIX

APPENDIX

§ 1205. Powers and functions of the Merit Systems Protection Board and Special Counsel

(a) The Merit Systems Protection Board shall—

(1) hear, adjudicate, or provide for the hearing or adjudication, of all matters within the jurisdiction of the Board under this title [5 USCS §§ 101 et seq.], section 2023 of title 38 [38 USCS § 2023], or any other law, rule, or regulation, and, subject to otherwise applicable provisions of law, take final action on any such matter;

(2) order any Federal agency or employee to comply with any order or decision issued by the Board under the authority granted under paragraph (1) of this subsection and enforce compliance with any such order;

(3) conduct, from time to time, special studies relating to the civil service and to other merit systems in the executive branch, and report to the President and to the Congress as to whether the public interest in a civil service free of prohibited personnel practices is being adequately protected; and

(4) review, as provided in subsection (e) of this section, rules and regulations of the Office of Personnel Management.

(b)(1) Any member of the Merit Systems Protection Board, the Special Counsel, any administrative law judge appointed by the Board under section 3105 of this title [5 USCS § 3105], and any employee of the Board may administer oaths, examine witnesses, take depositions, and receive evidence.

(2) Any member of the Board, the Special Counsel, and any administrative law judge appointed by the Board under section 3105 of this title [5 USCS § 3105] may—

(A) issue subpenas requiring the attendance and testimony of witnesses and the production of documentary or other evidence from any place in the United States or any territory or possession thereof, the Commonwealth of Puerto Rico, or the District of Columbia; and

(B) order the taking of depositions and order responses to written interrogatories

(3) Witnesses (whether appearing voluntarily or under subpena) shall be paid the same fee and mileage allowances which are paid subpenaed witnesses in the courts of the United States.

(c) In the case of contumacy or failure to obey a subpena issued under subsection (b)(2) of this section, the United States district court for the judicial district in which the person to whom the subpena is addressed resides or is served may issue an order requiring such person to appear at any designated place to testify or to produce documentary or other evidence. Any failure to obey the order of the court may be punished by the court as a contempt thereof.

(d)(1) In any proceeding under subsection (a)(1) of this section, any member of the Board may request from the Director of the Office of Personnel Management an advisory opinion concerning the interpretation of any rule, regulation, or other policy directive promulgated by the Office of Personnel Management.

(2) In enforcing compliance with any order under subsection (a)(2) of this section, the Board may order that any employee charged with complying with such order, other than an employee appointed by the President by and with the advice and consent of the Senate, shall not be entitled to receive payment for service as an employee during any period that the order has not been complied with. The Board shall certify to the Comptroller General of the United States that such an order has been issued and no payment shall be made out of the Treasury of the United States for any service specified in such order.

(3) In carrying out any study under subsection (a)(3) of this section, the Board shall make such inquiries as may be necessary and, unless otherwise prohibited by law, shall have access to personnel records or information collected by the Office and may require additional reports from other agencies as needed.

(e)(1) At any time after the effective date of any rule or regulation issued by the Director in carrying out functions under section 1103 of this title [5 USCS § 1103], the Board shall review any provision of such rule or regulation—

(A) on its own motion;

(B) on the granting by the Board, in its sole discretion, of any petition for such review filed with the Board by any interested person, after consideration of the petition by the Board; or

(C) on the filing of a written complaint by the Special Counsel requesting such review.

(2) In reviewing any provision of any rule or regulation pursuant to this subsection the Board shall declare such provision—

(A) invalid on its face, if the Board determines that such provision would, if implemented by any agency, on its face, require any employee to violate section 2302(b) of this title [5 USCS § 2302(b)]; or

(B) invalidly implemented by any agency, if the Board determines that such provision, as it has been implemented by the agency through any personnel action taken by the agency or through any policy adopted by the agency in conformity with such provision, has required any employee to violate section 2302(b) of this title [5 USCS § 2302(b)].

(3)(A) The Director of the Office of Personnel Management, and the head of any agency implementing any provision of any rule or regulation under review pursuant to this subsection, shall have the right to participate in such review.

(B) Any review conducted by the Board pursuant to this subsection shall be limited to determining—

(i) the validity on its face of the provision under review; and

(ii) whether the provision under review has been validly implemented.

(C) The Board shall require any agency—

(i) to cease compliance with any provisions of any rule or regulation which the Board declares under this subsection to be invalid on its face; and

(ii) to correct any invalid implementation by the agency of any provision of any rule or regulation which the Board declares under this subsection to have been invalidly implemented by the agency.

(f) The Board may delegate the performance of any of its administrative functions under this title [5 USCS §§ 101 et seq.] to any employee of the Board.

(g) The Board shall have the authority to prescribe such regulations as may be necessary for the performance of its functions. The Board shall not issue advisory opinions. All regulations of the Board shall be published in the Federal Register.

(h) Except as provided in section 518 of title 28 [28 USCS § 518], relating to litigation before the Supreme Court,

attorneys designated by the Chairman of the Board may appear for the Board, and represent the Board, in any civil action brought in connection with any function carried out by the Board pursuant to this title [5 USCS §§ 101 et seq.] or as otherwise authorized by law.

(i) The Chairman of the Board may appoint such personnel as may be necessary to perform the functions of the Board. Any appointment made under this subsection shall comply with the provisions of this title, except that such appointment shall not be subject to the approval or supervision of the Office of Personnel Management or the Executive Office of the President (other than approval required under section 3324 [5 USCS § 3324] or subchapter VIII of chapter 33 of this title [5 USCS §§ 3391 et seq.]).

(j) The Board shall prepare and submit to the President, and, at the same time, to the appropriate committees of Congress, an annual budget of the expenses and other items relating to the Board which shall, as revised, be included as a separate item in the budget required to be transmitted to the Congress under section 201 of the Budget and Accounting Act, 1921 (31 U.S.C. 11) [31 USCS § 11].

(k) The Board shall submit to the President, and, at the same time, to each House of the Congress, any legislative recommendations of the Board relating to any of its functions under this title [5 USCS §§ 101 et seq.].

(Added Oct. 13, 1978, P. L. 95-454, Title II, § 202(a), 92 Stat. 1122.)

§ 7501. Definitions

For the purpose of this subchapter [5 USCS §§ 7501 et seq.]—

(1) "employee" means an individual in the competitive service who is not serving a probationary or trial period under an initial appointment or who has completed 1 year

of current continuous employment in the same or similar positions under other than a temporary appointment limited to 1 year or less; and

(2) "suspension" means the placing of an employee, for disciplinary reasons, in a temporary status without duties and pay.

(Sept. 6, 1966, P.L. 89-554, § 1, 80 Stat. 527; Oct. 13, 1978, P. L. 95-454, Title II, § 204(a), 92 Stat. 1134.)

AMICUS CURIAE

BRIEF

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 86-1552

IN THE

OCTOBER TERM, 1986

DEPARTMENT OF THE NAVY,

Petitioner,

v.

THOMAS E. EGAN,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF OF AMICUS CURIAE RALPH B. BOGDANOWICZ IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Merit Systems Protection Board in reviewing an adverse action taken pursuant to 5 USC 7512 and 7513, whose underlying basis is the revocation of a security clearance, shall apply the same review process as with other adverse actions taken under those sections.

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PRELIMINARY STATEMENT

Pursuant to Supreme Court Rule 36, consent of the parties having been obtained and filed along with this brief, Ralph B. Bogdanowicz, files this brief, as amicus curiae in opposition to the petition for a writ of certiorari filed by the Department of Navy.

INTEREST OF AMICUS CURIAE

Ralph Bogdanowicz was demoted from his position as an Electronic Equipment Worker, Installer, Repairer with the Department of Army, following their revocation of his security clearance. Mr. Bogdanowicz had appealed this demotion to the Merit Systems Protection Board (Board). The full Board initially found that it had the authority to review the propriety of the requisite security classification in connection with its review of an appealable action based thereon. After a hearing and another petition for review by Mr. Bogdanowicz, the Board totally reversed itself, now finding that in an adverse action over which it has jurisdiction, and which is based substantially on the agency's revocation of a security clearance, it has no authority to review the agency's security clearance determination. Mr.Bogdanowicz filed a petition for review to the Federal Circuit No. 86-510, which was stayed following a motion by the Department of Army pending resolution of the Egan case, although he was permitted an opportunity, which he exercised, to file an amicus brief to the Federal Circuit. Mr. Bogdanowicz was the only amicus participating before the Federal Circuit and his brief was cited prominently therein.

Mr. Bogdanowicz, along with eleven other similarly situated employees to Mr. Egan, have cases pending in the Federal Circuit. (Eight of those cases were identified by the Department of Navy in its Statement of Related Cases contained in its principal brief to the Federal Circuit).

Counsel of record for Mr. Bogdanowicz is staff counsel with the American Federation of Government Employees, (AFGE) which represents approximately 700,000 civilian employees of the Federal government. AFGE and Mr. Bogdanowicz have a similar interest in assuring that property and liberty interests are not discarded without adequate due process and ensuring that the federal civilian personnel appellate scheme intended by Congress does not become eroded, while assuring the interests of national security.

REASONS FOR DENYING THE PETITION

I. There is Absolute Consistency Among The Federal Circuits Considering This Matter that the Board has the Authority to Review the Underlying Security Clearance Revocation Determination.

The Department of Navy ("government") attempts to deftly skirt the inexorable fact that the two Federal circuits considering this issue have consistently and clearly asserted the Board's authority and responsibility to review the underlying basis for the security clearance revocation in the context of an adverse action based thereon. The government repudiates not only the Federal Circuit analysis in the instant matter, but at footnote 3 of its brief dismisses the District of Columbia Circuit's similar reasoning in *Hoska* v. *Department of Army*, 677 F.2d 131 (D.C. Cir. 1982) as mere second guessing.[1]

The government attempts to now postulate its reasoning for not seeking certiorari five years ago in *Hoska* as in part due to the fact that under the Federal Courts Improvement Act of 1982, future appeals from Board decisions would be to the Federal Circuit.

This is not only a rather blatant attempt at belated judicial posturing, but if it was the case, represents a judgment of questionable prudency. For in the very next paragraph of footnote 3, the government acknowledges that the Board relied on *Hoska* to fully review security clearance revocations in other adverse action cases. Most disturbingly, the government does not acknowledge that in *Hoska* it never even challenged the authority of the Board to review the basis for the underlying security clearance revocation. For as the District of Columbia Circuit stated in *Hoska*, "both sides agree that the legality of [Petitioner's] dismissal depends entirely upon the legality of the security clearance revocation." Thus the government's belated reasoning becomes even more curious. Moreover, the government is well aware of the precedential value of the *Hoska* opinion and the obvious ability of any appellant in a case arising in the District of Columbia, who also raises the issue of discrimination, to obtain a full review of the underlying security clearance revocation, as all issues would ultimately come before the District of Columbia Circuit following disposition by the District Court. *Williams* v. *Department of Army*, 715 F.2d 1485 (Fed. Cir. 1983).[2]

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[1] The government unfortunately utilizes this term "second guessing" at least a half dozen times in its brief, ignoring the complex and circumscribed review scheme under 5 USC 7701 et seq. and 5 CFR 1201.1 et seq.

II. The Statutory Scheme and Case Law, as well as the Due Process Clause of the Constitution, Require that Respondent Be Afforded a Hearing to Challenge the Security Clearance Revocation Underlying an Agency's Adverse Action.

Before setting out its purported reasons for having this Honorable Court grant the petition, the government sets forth at page 9 of its brief, restated elsewhere, that the decision below subjects every denial of a security clearance to a civilian government employee to "de novo review" whenever the denial leads to an adverse action reviewable by the Board under Section 7513. Use of the term "de novo" is certainly a misnomer, but more fundamentally exemplifies the misconception the government attempts to impart upon

this Court. The term "de novo" connotes hearing "afresh, anew or a second time." *Black's Law Dictionary* 483 (4th ed. 1974). Notwithstanding this misplaced utilization of this term, nowhere else its brief does the government acknowledge that at no point in the security revocation proceedings established by it, does the employee have an opportunity for a hearing to challenge the grounds for the the security clearance revocation. No opportunity for confrontation or cross examination exists in the Department of Navy process, and under the government's suggested scheme, any minimal ability to refute the underlying charges at a hearing would be totally foreclosed.

The pervasive reason asserted by the government for granting the petition for certiorari of detriment to the national security, is not only overstated and inaccurate, as found by the Federal Circuit below, but completely ignores the fundamental rights and property and liberty interests at stake for individual affected employees.

The first numbered paragraph by the government, at pages 9-12 of the brief, focuses in on Executive Order 10450 and the case law developed concerning challenges to security clearance revocations. The government's analysis totally ignores significant portions of the Executive Order relied on by the Federal Circuit below. As the Federal Circuit set forth:

> The Executive Order does not address appellate review of an agency's grant or denial of security clearance, although it discusses the factors to be weighed to determine whether a person's employment is consistent with the interests of national security. Id at §8. The Executive Order establishes responsibilities within the executive branch and is entirely consistent with the civil service laws before us. It does not purport to preclude the application of these laws. (Appendix p. 14a).

The government, in its supposition that an independent body such as the Board is ill equipped to review these matters, speaks in general terms of reliability and loyalty. However, the government fails to elucidate that the major purpose of an appeal to the Board is to challenge the factual accuracy and validity of the underlying alleged misconduct. In Respondent's case, the Board is asked to make their typical factfinding inquiry based upon an analysis of the probative value and reliability of evidence, including witness credibility and physical and documentary evidence, in order to determine whether Mr. Egan had actually committed crimes, failed to disclose required information about the crimes, or indulged in alcohol to an excess. These are the types of factual inquiries the Board routinely makes in all adverse action cases. The Federal Circuit below recognized the elemental unfairness and due process deprivation of denying an employee any opportunity to challenge these allegations. Describing this process before the Board, the Federal Circuit stated:

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[2] Not only then is the government attempting to overturn the consistent decisions of every federal circuit considering this issue, but to achieve its purpose, it now seeks to repudiate the position it itself took in *Gayer* v. *Schlesinger*, 490 F.2d 740 (D.C. Cir. 1973) (Petitioner's brief, footnote 9) There, the government concurred in the application of a "sufficient proof to support a rational nexus standard."

> Despite warnings by the presiding official concerning deficiences in the evidence and the agency's burden of proof, the agency had elected to rely solely on conclusory statements in its letters of proposed and final denial of clearance and on the allegations in its brief, unsubstantiated by evidence. The presiding official also held that the agency "failed to present any evidence showing it conscientiously weighed the circumstances surrounding appellant's alleged misconduct and reasonably balanced it against the interests of national security," including whether Mr. Egan actually concealed prior offenses on his SF 171, whether offenses for which Mr. Egan had been arrested but subsequently found not quilty had been considered as proof of his misbehavior, and whether the [favorable] statements from Mr. Egan's supervisors had been considered. (Appendix p. 5a).

The Board is entrusted, inter alia, with making determinations regarding unlawful prohibited personnel

practices, improper ex parte communications, and assessing the appropriateness of the penalty, while not substituting its judgment for that of the agency. While an agency may in a given situation have cause for revoking a security clearance, it may have other suitable positions, which an employee qualifies for, which do not require a security clearance. Absent review by the Board in these cases, an agency's termination of an employee despite the availability of other positions would remain unreviewable and undisturbed, no matter how arbitrary, discriminatory, or motivated by bad faith.

Moreover, as the court recognized, the basis for the agency's adverse determination was pursuant to specific criteria in the agency's regulations concerning criminal or dishonest conduct, deliberate false statements and habitual use of intoxicating beverages. The Federal Circuit further plainly recognized that "overstatement infects the Board's position that it would inevitably be faced with agency exposition of highly sensitive materials. No such materials were asserted in Mr. Egan's appeal before the presiding official." (Appendix p. 17a). Furthermore the court found that the Board's determination of nexus between criteria set out in the agency regulations and the employee's ability to safeguard classified information is not unlike other nexus determinations by the Board. It would not threaten disclosure of classified information. The parties already know the typical arguments made by the agency that the alleged misconduct, would expose an employee to blackmail; that notoriety reflects adversely on the reputation of the agency; and presents concerns of trustworthiness, etc. Nothing in this process has or would involve exposure of matters harmful to the national security. These issues have been consistently reviewed now by the Board and the courts without any incident or claim of improper national security breach or disclosure. If a particular case, unimagined by this amicus, remotely suggested this, an in camera examination could be considered.

The suggestion by the government that prior to the Civil Service Reform Act of 1978, to their knowledge, there had not been a case in which a denial of a security clearance to a government employee had been reviewed on the merits, begs the question. Firstly, the Civil Service Reform Act formalized an adverse action appeal mechanism under a truly independent, nonmanagement oriented review body, in the Board, for the very first time. More significantly, there has been a long history of full judicial review of security clearance denials/revocations of employees of defense contractors. *Gayer* v. *Schlesinger, supra; McKeand* v. *Laird*, 490 F.2d 1262 (9th Cir. 1973); *Marks* v. *Schlesinger*, 384 F. Supp. 1373 (C.D. Cal. 1974). The implications of alleged national security disclosures are no less paramount in the case of security contractor employees than that of federal employees. Government contractor employees always had hearings on these matters without any government allegation or demonstraton of compromise to the national security. As previously set forth, the government concurred in the application of a "suficient proof to support a rational nexus" standard in these cases. *Gayer* v. *Schlesinger*, supra. In *Adams* v. *Laird*, 420 F.2d 230 (D.C. Cir. 1969), cited by the government, an applicant for government contract work did not attempt to disprove the existence of a nexus, but rather to prevent the finding that he engaged in the alleged homosexual acts. Acceptance of this government notion to deprive federal employees of any hearing to challenge the basis for security clearance revocations would create the entirely anomalous and unjust result that a person employed in private industry would get greater due process protections by the government, than federal employees. Congress neither intended nor could have envisioned this result. 5 CFR 155 (1972) entitles a person in private industry, denied security clearance access, to receive a statement of reasons, furnish an answer, and be entitled to a hearing become a hearing examiner. The proceeding before the hearing examiner includes provision for discovery, presentation of evidence on one's own behalf, cross-examination of witnesses and the ability "to ascertain all relevant facts in order that a fair and impartial determination may be reached." *Gayer* v. *Schlesinger, supra.*

The petition for certiorari totally ignores the potential abuse, stigmatizing effect, and career destruction incidental to an erroneous determination of misconduct or unacceptable behavior, rendering one an alleged security risk. It totally ignores the due process implications the Federal Circuit found were inherent in the total deprivation of a pre- or post termination hearing on the validity of the charge. (Appendix 20a-22a) Mr. Egan, as well as other similarly situated employees, has a property interest in continued employment with the federal government and in retention of the civil service position he maintained. *Board of Regents* v. *Roth*, 408 U.S. 564 (1972). *Matthews* v. *Eldridge*, 424 U.S. 319 (1976). Congress, as noted in *Arnett* v. *Kennedy*, 416 U.S. 134 (1974), in enacting the Lloyd La Follette Act (predecessor to the Civil Service Reform Act) was obviously intent on according a measure of statutory job security to governmental employees, which they had not previously enjoyed, and included therein was a guarantee against removal, enforced by a procedural mechanism designated for the determination of cause. Similarly, as the Federal Circuit recognized, Mr. Egan has a liberty interest protected by the Fifth Amendment. That liberty interest is based on charges against Mr. Egan regarding trustworthiness and ability to safeguard confidential information that might seriously damage his standing and associations in the community. Where a person's good name, reputation, honor or integrity is at stake because of what the government is doing to him, notices and opportunity to be heard are essential. *Wisconsin* v. *Constantineau* 400 U.S. 433 (1971). As the Federal Circuit recognized, that liberty interest may be offended based upon an unsupported charge which could wrongfully stigmatize the reputation of an employee.

The hearing in such a case is to provide the person an opportunity to clear his name. Accord: *Goss* v. *Lopez*, 419 U.S. 565 (1975). The Federal Circuit declared "as discussed in *Arnett* v. *Kennedy*, 416 U.S. 134 (1974), Federal employee due process requires a full evidentiary hearing at some point in the termination proceedings, if not before removal, then after." See also *Cleveland Board of Education* v. *Loudermill* 105 S. Ct. 1487, 1496, (1985). There is no provision in the Department of Defense regulations for any type of hearing prior to or subsequent to revocation of the security clearance, nor was a hearing accorded.[2] As the Federal Circuit below recognized, the right to a hearing is particularly cogent in the security clearance context, as final adverse personnel security actions are reported in a Defense Central Index of Investigations, making it difficult, perhaps impossible for Mr. Egan to obtain further government employment. (Appendix p. 21a). The Federal Circuit declares:

> The Board by refusing to review an agency's reasons for refusal of security clearance denies to those federal employees the minimal opportunity to correct agency error, or to be protected from specious, arbitrary, or discriminatory actions [footnote 6 omitted]. The Board thus violated the Congressional mandate that it "protect the rights of employees, recognized by the Supreme Court in *Arnett* v. *Kennedy*, 416 U.S. 134 (1974), to a full and fair consideration of their case." (Appendix p. 22a).

The second principal argument presented by the government to preclude a meaningful review, is the alleged lack of specific statutory authority for such review. The government suggests that the Federal Circuit's decision rests on a "supposed presumption of MSPB review arising from the

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[2] Notwithstanding this fact, any internal hearing that might be accorded would be inherently partial and incapable of the objectivity of an independent and neutral adjudication.

failure of the Act to preclude it expressly." This suggestion is truly preposterous, based on the clear and precise reliance by the Federal Circuit on statutory language and legislative history, and represents a perversion of principles of statutory construction. Indeed the Federal Circuit found:

> The statute provides no exclusion from Board review of removals under 5 USC §7513 (a), the provision under which Mr. Egan was removed on the grounds of failure to receive a job-required security clearance. We have found no indication in the legislative history of the Civil Service Reform Act that such a removal action if taken under §7513 (a) was intended to be exempt from Board review, and the government has not asserted that Congress so intended. (Appendix p. 8d).

It is patently fallacious to suggest as does the government that Congress in enacting the Civil Service Reform Act had an understanding that denials of security clearances are not subject to substantive review, and "in the absence of affirmative evidence of an intent to make such a dramatic change, the presumption is that the statute codified without change the federal employee appeal rights that had previously existed only by Executive Order." This argument is seriously misguided as the Federal Circuit recognized that it is the government that is suggesting this "new procedure" that would result in an abdication of the Board's statutory responsibilities, absent contrary Congressional authorization (Appendix p. 12a, 13a). Moreover, as set forth infra, the Executive Order does not preclude such review.

The entire analysis by the government refuses to recognize or reveal the alternative removal procedures available to the Department of Navy under 5 USC §7512 or §7532. As the Federal Circuit declared, "the agency does not argue that it could not have removed Mr. Egan pursuant to the provisions of 5 USC §7532, and thereby have avoided Board review."[3] As the Federal Circuit further found, the agency chose to remove Mr. Egan under 5 U.S.C. §7512 and must adhere to the procedures under that section, including the obligations under 5 U.S.C. §7701, to review agency actions taken under 5 U.S.C. §7512. As the court recognized, the absence of any statutory provision precluding appellate review of security denials in Section 7512 creates a presumption in favor of appellate review. *Abbott Laboratories* v. *Gardner*, 386 U.S. 136, 141 (1967). The government's citation to *Cole* v. *Young*, 351 U.S. 536 (1976) again fails to acknowledge this Court's clear recognition that this case involved Section 7532 as it concerns the immediate threat of harm to the national security. National security is defined therein as only those activities of the government directly concerned with protection of the nation from internal subversion or foreign aggression. As the Federal Circuit clearly recognized, it is indeed anomalous that the "summary" removal procedures in cases of an immediate threat of harm to the national security designed by Congress under Section 7532 would far exceed the due process protections urged by the government under Section 7512. For under Section 7532 an employee is entitled to a hearing by an agency authority duly constituted for this

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[3] The routine availability of 5 U.S.C. §7532 in all security clearance cases is highly questionable, however this is not a justiciable matter in this case, as the government proceeded under 7512, and have never disputed the nonexclusivity of 7532. In this regard however, this Court stated in *Cole* v. *Young*, 351 U.S. 536 (1956), "in the absence of an immediate threat of harm to the national security, the normal dismissal procedures seem fully adequate and the justification for summary powers disappears." Moreover, this court recognized in *Cole* v. *Young*, supra that Section 7532 was designed to provide for dismissal of security risks i.e. employees having access to classified information. It must be noted that not all positions requiring security clearances have access to classified information.

purpose to review the grounds for the security clearance revocation. Under the government's concept of Section 7512 no such hearing would be available (Appendix p. 19a).

The suggestion by the government at page 13 of its brief that 5 U.S.C. §7512 and 7513 provide for review of a removal, but "neither provides nor suggests a presumption that all other agency decisions become reviewable on the merits whenever they lead immediately or eventually to a reviewable removal," is illogical and erroneous. It is not possible to seriously review a removal based entirely on a revocation of a security clearance without ascertaining the legitimacy of the facts supporting the security clearance revocation. The Federal Circuit recognized that *Zimmerman* v. *Department of Army*, 755 F.2d 156 (Fed. Cir. 1985) and *Buriani* v. *Department of Air Force*, 777 F.2d 674 (Fed. Cir. 1985), again now cited by the government:

> turn on the long established premise that "the military constitutes a specialized community governed by a separate discipline from that of the civilian" and that it is not the role of the judiciary to intervene in the orderly execution of military affairs. *Orloff* v. *Willoughby*, 345 U.S. 83, 94 (1953). The civil service laws do not cover military service . . . these decisions affirming that restraint do not control Mr. Egan's situation . . . The reasons for refraining from judicial review exemplified in *Zimmerman* and *Buriani* are not here present. (Appendix p. 16a).

While this Court recognizes in *Orloff*, the military's pervasive practices of favoritism or discrimination, federal personnel management is to be implemented consistent with merit system principles and free from prohibited personnel practices, 5 U.S.C. 1101. Moreover, with respect to the cases cited by the government at footnote 10 of their brief, relating to criminal convictions and bar decertifications, the court below declared:

> These decisions are distinguished on the simple ground that they relate to collateral attack on the decisions on other tribunals. The criminal conviction in *Crofoot [v. Government Printing Office, 21 MSPR 248 (1984) rev'd on other grounds, 761 F.2d 661 Fed. Cir. 1985)].* and the bar decertification in *McGean* [v. NLRB, 15 MSPR 49 (1983)] were not federal agency actions; they were actions of entirely separate regulation or enforcement, in which the agency removing the employee had no role. A person can obtain review of the underlying facts pertinent to criminal conviction or loss of bar certification by appropriate judicial process. In Mr. Egan's case, as decided by the Board, the agency that removed him achieves a complete absence of appellate review of the underlying facts by any tribunal at all, merely by referring to the national security, whether or not that is a supportable reason for the removal (Appendix p. 17a).

The final government argument concerning an alleged incongruity between the standard of proof governing Board appeals under 5 U.S.C. 7701 (c)(1)(B) and Executive Order 10450, was never asserted by the government below or raised before the Board. In *EEOC* v. *FLRA*, 106 S. Ct. 1678, 1681 (1986) this Court recognized that it improvidently granted certiorari to consider issues raised by the government that were not raised below. Notwithstanding, the government's argument is simply an attempt to rewrite the civil service statute to thwart any review of its decisions, no matter how arbitrary. Moreover, there is nothing inconsistent between the Board's standards as a reviewing authority and the Executive Order.

CONCLUSION

For the aforesaid reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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PETITIONER'S

BRIEF

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In the Supreme Court of the United States

OCTOBER TERM, 1987

DEPARTMENT OF THE NAVY, PETITIONER

v.

THOMAS M. EGAN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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QUESTION PRESENTED

Whether, in the course of reviewing the removal of an employee for failure to maintain a required security clearance, the Merit Systems Protection Board is authorized by statute to review the substance of the underlying decision to deny or revoke the security clearance.

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In the Supreme Court of the United States

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v.

THOMAS M. EGAN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-42a) is reported at 802 F.2d 1563. The opinion of the Merit Systems Protection Board (Pet. App. 43a-60a) is reported at 28 M.S.P.R. 509. The earlier opinion of a presiding official of the MSPB (Pet. App. 61a-68a) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 69a) was entered on October 1, 1986. A petition for rehearing and a suggestion for rehearing en banc were denied on November 26, 1986 (Pet. App. 71a), and December 8, 1986 (Pet. App. 70a), respectively. On February 18, 1987, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including March 26, 1987. The petition was filed on that date and was granted on May 26, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The pertinent statutory provisions are set forth in Pet. App. 72a-75a and in Respondent's Brief in Opposition Appendix 1a-6a.

STATEMENT

1. In November 1981, respondent Thomas Egan was hired as a laborer at the Trident Naval Refit Facility in Bremerton, Washington (Pet. App. 1a-2a). The mission of the Refit Facility is to provide "quick turnaround repair, replenishment and systems checkout of the TRIDENT submarine over its extended operating cycle" (C.A. App. 3).[1] The Trident submarine is nuclear powered and carries nuclear weapons. It is the most sophisticated and sensitive weapon in the Navy's arsenal and plays a crucial part in our nation's defense system. See generally *Concerned About Trident* v. *Schlesinger*, 400 F. Supp. 454, 462-466 (D.D.C. 1975). As a consequence, all positions at the Refit Facility are classified as sensitive, requiring incumbents of such positions to "quality for and maintain eligibility for a security clearance as a condition of employment" (C.A. App. 35).

Respondent was hired as a civilian employee of the Navy, subject to the provisions of the Civil Service Reform Act of 1978 (CSRA), 5 U.S.C. 1201 *et seq.* His position entailed "access to classified information regarding arrival/departure of submarines and access to classified/restricted areas or equipment aboard the submarines" (C.A. App. 44). Without a security clearance, respondent could not do the job. His employment was therefore expressly conditioned on his subsequently receiving such a

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[1] "C.A. App." cites are to the appendix to the government's brief in the court of appeals.

clearance (Pet. App. 1a-2a). Pending the outcome of his security investigation, respondent performed strictly limited duties and was not permitted to go aboard the submarines (C.A. App. 44).

On February 16, 1983, the Director of Naval Civilian Personnel Command issued a letter of intent to deny respondent a security clearance based upon various criminal records in California and Washington reflecting convictions for assault and for being a felon in possession of a gun, and based upon his failure to disclose on his application for federal employment two earlier convictions for carrying a loaded firearm (C.A. App. 36-39). The Navy also relied upon respondent's own statements that he had had drinking problems in the past and that he had served the final twenty-eight days of one sentence in an alcohol rehabilitation program (*id.* at 38).

In accordance with Navy regulations governing security clearances,[2] respondent was informed that he had a right to respond to the proposed denial and to "submit any statements, documents, or other materials to explain, mitigate or refute the information" contained in the letter (C.A. App. 38). On May 6, 1983, respondent answered the Navy's letter of intent, asserting that he had paid his debt to society for his convictions, that he had not listed convictions older than seven years because he did not interpret the employment form as requiring that information, and that he believed that alcohol had not been a problem for the three years preceding the clearance determination (*id.* at 40-42). He also provided favorable material from supervisors concerning his background and character.

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[2] See Chief of Naval Operations Instructions (OPNAVINST) 5510.1F (June 15, 1981) (reprinted in C.A. App. 26-34) implementing DOD Regulation 5200.2-R (Dec. 1979). See also NCPC Instruction 5521.1, pertinent only to civilian personnel. OPNAVINST 5510.1F was amended on April 20, 1984, and is now OPNAVINST 5510.1G. Unless otherwise specified, all references are to the Navy Regulations in force at the time respondent was denied a security clearance.

The Director of Naval Civilian Personnel Command, after considering this response, concluded that the information provided did "not sufficiently explain, mitigate or refute" the reasons on which the intended denial was based (C.A. App. 43). Accordingly, the Director affirmed the decision to deny respondent a security clearance. Respondent appealed this decision to the Personnel Security Appeals Board (PSAB) on June 24, 1983.[3] The PSAB affirmed the denial of the security clearance on September 1, 1983.

Without a security clearance, respondent was not eligible for the position for which he had been hired. Reassignment to a nonsensitive position at the Facility was not possible because none existed. And "[t]here [were] no methods of restructuring the job environment, providing an escort, or sanitizing work areas which [respondent's] position must access." C.A. App. 48. Accordingly, on June 17, 1983, the Navy issued a notice of proposed removal (*id.* at 44-46). Respondent was informed that he was entitled to respond to the notice, to be represented by counsel or a union representative, and to "review the material relied on to support this proposed removal" (*id.* at 45-46). He was placed on administrative leave pending a final decision. Respondent did not reply to the notice of proposed removal, and, on July 15, 1983, he was informed that the removal would become effective on July 22, 1983 (*id.* at 47-48).

2. Respondent sought review of his removal by the Merit Systems Protection Board (MSPB or Board) pursuant to 5 U.S.C. 7513(d). Under Section 7513, an agency may remove an employee for "such cause as will promote the efficiency of the service." The statute provides employees with a number of procedural protections, including notice, an opportunity to respond and be represented by counsel, and a written decision. The affected employee—unless a nonveteran in the excepted service—

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[3] This appeal and the PSAB response are in the administrative record but were not included in the court of appeals appendix.

may also appeal the agency's decision to the MSPB, which will sustain the action if it is "supported by a preponderance of the evidence" (5 U.S.C. 7701(c)(1)(B)).[4]

The "cause" for respondent's removal was his "failure to meet the requirements of [his] position due to denial of [his] security clearance" (C.A. App. 44). The government argued before the MSPB that its review was limited to determining whether the proper removal procedures had been followed and whether a security clearance was in fact a requirement of respondent's position. The government contended that the MSPB did not have authority to judge the merits of the underlying security clearance determination.

a. The MSPB presiding official ruled that the Board did have authority to review the merits of the security clearance determination (Pet. App. 62a). She further ruled that, in order to facilitate such review, the agency must specify the precise criteria used in its security clearance decisions and show that those criteria are rationally related to national security concerns (*id.* at 62a-63a). The presiding official stated that the agency must then show, by a preponderance of the evidence, first, that the employee's acts precipitating the revocation or denial of his security clearance actually occurred and, second, that the "employee's alleged misconduct has an actual or potentially [*sic*] detrimental effect on national security interests" (*id.* at 63a). The presiding official held that "the ultimate burden is upon the agency to persuade the Board of the appropriateness of its decision to deny or revoke an employee's security clearance" (*id.* at 64a).

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[4] Under 5 U.S.C. 7532, "the head of an agency" may suspend an employee "when he considers that action necessary in the interests of national security" and, after specified procedures, may remove a suspended employee when "he determines that removal is necessary or advisable in the interests of national security." Removals under Section 7532 are not subject to MSPB review (see 5 U.S.C. 7512(A)). However, the Navy did not invoke Section 7532 in this case; accordingly, the removal action was subject to MSPB review as provided in 5 U.S.C. 7513.

The presiding official concluded that it was not possible to determine whether the Navy's determination to deny respondent's security clearance was justified because the Navy did not submit a list of the criteria it used in making clearance determinations and because it did not present evidence that it had "conscientiously weighed" the circumstances surrounding respondent's misconduct and "reasonably balanced" the misconduct against national security concerns (Pet. App. 65a). Accordingly, the presiding official concluded that the Navy had "failed to show that it reached a reasonable and warranted decision concerning the propriety of the revocation of [respondent's] security clearance" (*id.* at 66a). The presiding official therefore ordered respondent reinstated (*ibid.*).

b. The Navy petitioned the full Board for review of the presiding official's decision. The MSPB had before it numerous petitions for review raising similar issues of law and treated this case as the lead case. The Board formally invited and received briefs from interested agencies, employee organizations, and others concerning the proper scope of its review of security clearance determinations, the appropriate remedy if review is available and the determination is adverse to the agency, and whether 5 U.S.C. 7532 (see n.4, *supra*) is the exclusive authority for removals based upon national security concerns (49 Fed. Reg. 48623-48624 (1984) and 50 Fed. Reg. 2355 (1985)).

In a unanimous decision the MSPB noted, as an initial matter, that there is no clear authority on the question of its jurisdiction to review security clearance determinations. It said the statutory provisions granting the Board jurisdiction to review adverse personnel actions "do not specifically address the extent of the Board's review of the underlying determination" (Pet. App. 47a), and the legislative history of the CSRA "also does not address the extent of the authority Congress intended the Board to exercise in reviewing revocations or denials of security clearances which result in Chapter 75 actions" (*id.* at 47a-48a). The Board added that there is no binding legal precedent on point (*id.* at 48a-49a).[5]

The Board noted, however, that the MSPB is "purely a creation of statute" and therefore has only those powers granted to it by statute (Pet. App. 54a). Traditionally, the Board said, it has declined to exercise jurisdiction over matters committed to the discretion of other agencies which are not expressly included within the Board's review authority. For example, the MSPB has always refrained from exercising jurisdiction over "matters traditionally within military purview" which might form the basis of an adverse personnel decision (*id.* at 50a). Similarily, the Board has declined to re-examine other decisions underlying adverse personnel actions, such as criminal convictions or bar decertifications, where those decisions "are committed to appropriate procedures within the respective entities and, additionally involve determinations wherein the Board lacks a specific grant of jurisdiction" (*id.* at 52a).

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[5] In *Hoska* v. *Department of the Army*, 677 F.2d 131 (D.C. Cir. 1982), a civilian employee of the Army was terminated for failure to maintain a security clearance necessary for his position. The MSPB affirmed the termination. The District of Columbia Circuit (which had jurisdiction to review the MSPB decision because the matter arose prior to the Federal Courts Improvement Act of 1982, 28 U.S.C. 1295(a)(9)), reversed on the ground that revocation of the security clearance was unjustified. The court purported to require only that there be "*some rational nexus* between the adverse action taken and the government's articulated reasons for the action" (677 F.2d at 137 (emphasis added)). In fact, however, the court was in some instances clearly second-guessing the security clearance determination. See, *e.g.*, 677 F.2d at 143, 144 (footnote omitted) ("[e]ven if an incident such as this one could rationally be viewed as involving 'immoral or notoriously disgraceful conduct,' it is not clear from the Army's evidence that it is of a serious enough degree—an inquiry mandated by the Army regulation—to justify revocation of petitioner's security clearance"); see also *id.* at 144 n.21.

The MSPB in this case declined to follow *Hoska* on the ground that while the court there reviewed the merits of a security clearance revocation, it did not discuss the authority of the Board to do so (Pet. App. 49a). Furthermore, the MSPB noted, in light of the Federal Courts Improvement Act *Hoska* "is persuasive authority only and not precedential for Board decisions" (*id.* at 49a n.4). Several MSPB presiding officials nonetheless relied on *Hoska* in holding that they have authority to second-guess security clearance determinations and to order clearances restored. See *Skees* v. *Department of the Navy*, No. PH07528410257 (M.S.P.B. June 14, 1984), slip op. 13; *Peterson* v. *Department of the Navy*, No. BN07528410010 (M.S.P.B. Feb. 14, 1984), slip op. 8; *Irving* v. *Department of the Navy*, No. BN07528410005 (M.S.P.B. Feb. 3, 1984), slip op. 9. It was such decisions generated by *Hoska* that led the Board to examine the scope of its review authority in this case.

The MSPB noted that security clearance determinations are "committed by law exclusively to the employing agencies within the executive branch of the government" (Pet. App. 50a, citing Exec. Order No. 10,450, 3 C.F.R. 936 (1949-1953 Comp.), *reprinted as amended in* 5 U.S.C. 7311 note; Pet. App. 75a-86a). The Board added that "an adverse action based on the loss of a security clearance is a bifurcated proceeding in which the Board's explicit authority extends only to the ultimate adverse action" (Pet. App. 52a). The Board said that if it reviewed security clearance determinations the Board would "inevitably be faced with agency exposition of highly sensitive materials and Board determinations on matters of national security" (*id.* at 53a).

Given the "degree of sensitivity" attaching to clearance determinations and the fact that such determinations are expressly committed to agency discretion, the Board concluded that it "has no authority to review the agency's stated reasons for the security clearance determination" in the course of reviewing an otherwise reviewable adverse personnel action resulting in whole or in part from the clearance determination (Pet. App. 54a). "However," the Board added, "[we] will review the procedures utilized by the agency to ensure that the agency afforded the [employee] procedural due process" (*ibid.*). Specifically, the Board held that where an adverse personnel action is based upon the denial or revocation of a security clearance, the Board's review would be limited to determining that the position required a security clearance, that the employee did not qualify for or maintain eligibility for that clearance, and that the agency had afforded the employee procedural due process (which the Board held to consist, at a minimum, of notice, a statement of reasons for a negative decision, and an opportunity to respond) before taking adverse action (*ibid.*). Applying these requirements to respondent's case, the Board sustained the Navy's action in removing him from employment at the Refit Facility (*id.* at 58a- 60a).[6]

3. Respondent appealed to the United States Court of Appeals for the Federal Circuit pursuant to 5 U.S.C. 7703. By a divided vote, the court reversed the Board's decision that it has no authority to review the merits of security clearance determinations underlying removals and other adverse personnel actions (Pet. App. 1a-42a).

a. The court of appeals agreed with the Board that 5 U.S.C. 7532 is not the sole authority for removals based upon national security concerns (Pet. App. 11a-12a). It held, however, that when an agency elects to proceed with a removal without invoking and following Section 7532, its action "carries Board review" (Pet. App. 12a), including review of the merits of the underlying agency determination to deny or revoke a security clearance (*id.* at 12a-22a). The court stressed that 5 U.S.C. 7701, which prescribes procedures governing Board review of removals and other adverse personnel actions, does not expressly exclude or preclude review of underlying security clearance determinations. Therefore, the court concluded, there is a "strong" presumption in favor of such review (Pet. App. 13a (citing *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 141 (1967)). "In sum," the court said, "the Board is required to review the agency action taken against [respondent] with the same full process and standards and scope of review, established by law and precedent, as any other adverse action taken under Section 7512" (Pet. App. 19a).

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[6] In light of its determination of the appropriate extent of review, the Board concluded that it would not in any event have authority to order an agency to restore a security clearance (Pet. App. 55a). Where an agency failed to provide proper procedures, the Board's remedy would be to order the employee restored to pay status and remand to the agency to remedy the procedural defects (*id.* at 56a-58a). The Board also concluded that 5 U.S.C. 7532 is not the exclusive statutory authority for removals based upon national security concerns (Pet. App. 55a-56a).

The court concluded that the fact that security clearance determinations are "committed to the sound discretion of the agency" (Pet. App. 24a) does not make them unreviewable. It stated that since the Navy's regulations specify the criteria used in making clearance determinations, the Board is capable of ensuring that those criteria are met and that a nexus exists between the criteria and the employer's need to safeguard classified information (*id.* at 18a-19a, 24a). The court then remanded to the Board for such review, stating that the question of an appropriate remedy for respondent, should the Board rule that a security clearance was improperly denied, was not yet ripe for the court's review (*id.* at 22a-25a).

b. Chief Judge Markey dissented (Pet. App. 26a-42a). He noted that respondent had been given all the procedural protections to which he was entitled (*id.* at 30a-32a) and that respondent did not contest any of the facts upon which the Navy had based its determination but simply disagreed with the Navy's judgment that he should not be given a security clearance (*id.* at 26a-28a). Chief Judge Markey characterized the court's decision as an instruction to the MSPB to second-guess the wisdom of a security clearance determination, effectively transferring a discretionary decision vested in executive agencies with responsibility and qualifications to protect classified information to a body that has neither the responsibility nor the expertise to make such decisions (*id.* at 32a-33a). He suggested that, by severely diluting the ability of responsible agency heads to protect national security information, the panel's decision raised separation of powers concerns as well (*id.* at 37a-39a). He also noted that the Board would be unable to provide an appropriate remedy should it disagree with the merits of a security clearance determination (*id.* at 40a-42a).

SUMMARY OF ARGUMENT

The MSPB ruled, after full and careful consideration, that it does not have authority to review the merits of an agency's determination not to issue a security clearance. The Federal Circuit reversed and directed the MSPB to "review the agency action * * * with the same full process and standards and scope of review, established by law and precedent, as any other adverse action taken under Section 7512" (Pet. App. 19a); these standards include 5 U.S.C. 7701(c)(1)(A), which provides that the MSPB may sustain the agency action only if it is supported by a "preponderance of the evidence" presented to the agency at a hearing. The court of appeals' decision subjects every denial of a security clearance to a civilian government employee to de novo review whenever the denial leads to a suspension, removal, or other "adverse action" reviewable by the MSPB under Section 7513(d). We believe Congress cannot have intended to confer such power on the MSPB and that the decision below is therefore plainly wrong.

The President has the constitutional responsibility to protect information whose improper use or disclosure could affect national security. He has exercised this authority by directing Executive Branch agencies to classify information (Exec. Order No. 12,356) and to grant access to sensitive information only to those individuals whose access is "clearly consistent with the interests of the national security" (Exec. Order No. 10,450, §§ 2, 7). The requirement of an affirmative determination meeting this stringent standard is appropriate: it is better that nine persons who might never compromise sensitive information be denied access, than that access be granted to one person who does.

The denial of a security clearance is not a judgment on an individual's character or past conduct. It is based on an inability to predict—under all the circumstances, including those beyond his control—that the individual can and will sufficiently safeguard sensitive information. And although, because there are no nonsensitive positions at the Bremerton Refit Facility, the denial of a clearance led to respondent's removal, removal is by no means an automatic or ordinary consequence.

The determination whether to grant a security clearance is inherently discretionary. It can be made only by personnel who are familiar with the information to which a particular position grants access, its degree of sensitivity, the reasons for and sources of hostile interest in it, and the ways in which it could be compromised; with the range of factors that may lead a particular individual to act in a way that will compromise the particular information; and with the acceptable margin for error in a given case. An agency's inability to make the necessary affirmative prediction in a given case is inherently not subject to meaningful outside review, as the attempt at second-guessing by the MSPB presiding official in this case amply illustrates.

The text and history of Section 7513 and related provisions of the CSRA demonstrate that Congress did not intend to give the MSPB power to review the merits of security clearance determinations. The MSPB has the power to review "adverse actions," but the denial of a security clearance is not an "adverse action"; accordingly, although the MSPB has power to review the removal (including whether the position requires a security clearance, whether the required clearance was denied in accordance with agency procedures, and whether transfer to a nonsensitive position was feasible) the statute does not authorize the MSPB to review the merits of the clearance denial. Moreover, we know of no record of such review by the MSPB's predecessor, the Civil Service Commission, and the legislative history of the CSRA

negates any possibility that Congress intended to give the MSPB broader jurisdiction in this respect. Finally, other CSRA provisions, including the preponderance of the evidence standard applicable to MSPB review of adverse actions and the availability (in some circumstances) of arbitration at the request of the employee, are so obviously incompatible with review of the merits of the denial of a security clearance as to demonstrate clearly that Congress could not have intended such review.

Section 7532 authorizes "the head of an agency" to suspend an employee summarily and without pay when he considers such action "necessary in the interests of national security," and to remove a suspended employee when he determines that removal is "necessary or advisable in the interests of national security." The court of appeals found the availability of the Section 7532 procedure a "compelling" (Pet. App. 18a) argument in favor of MSPB review in any case where the Section 7532 procedure is not followed. That is a non sequitur.

Section 7532 is a drastic remedy for both the affected employee and the head of the agency, and its legislative history indicates it was to be used only in exceptional cases. The employee may be suspended summarily, without process and without pay, and may be removed "after such investigation and review as [the agency head] considers necessary." While a post-suspension intra-agency hearing, of unspecified scope, is provided for, neither the suspension nor the removal is subject to any outside review. And an employee removed under Section 7532 is not eligible for any other position in the agency and may not be appointed to any position elsewhere in the government without consultation with OPM. On the other hand, from the standpoint of the head of the agency, Section 7532 requires him to act personally, and it requires affirmative findings that suspension is "necessary" and then that removal is "necessary or advisable" in the interests of national security. To the extent that the existence of Section 7532 has any bearing on whether Congress intended the MSPB to review an underlying security clearance determination in a Section 7513 case, its significance is to demonstrate Congress's clear awareness that determinations based on national security considerations are not appropriate for outside review.

ARGUMENT

THE MERIT SYSTEMS PROTECTION BOARD IS NOT AUTHORIZED TO REVIEW THE MERITS OF THE DENIAL OR REVOCATION OF A SECURITY CLEARANCE IN THE COURSE OF REVIEWING AN EMPLOYEE'S REMOVAL FOR FAILURE TO MAINTAIN A CLEARANCE

The Civil Service Reform Act of 1978, 5 U.S.C. 7512 and 7513, provides for Merit Systems Protection Board review of removals for cause and other "adverse actions" affecting civilian employees of the government. Denial of a security clearance is not an "adverse action," and the CSRA does not by its terms grant the MSPB authority to review the merits of a security clearance denial in the course of reviewing an adverse action resulting from that denial. The court of appeals nevertheless ruled that "[t]he absence of any statutory provision *precluding* appellate review of security clearance denials in Section 7512 removals creates a strong presumption in favor of appellate review." Pet. App. 13a (emphasis added) (citing *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 141 (1967)). This was error. The determination whether it would be "clearly consistent with the interests of the national security" (Exec. Order No. 10,450, §§ 2, 7, 3 C.F.R. 936, 938 (1949-1953 Comp.)) to grant a security clearance to a particular employee is a sensitive and inherently discretionary determination, committed by law to the appropriate Executive Branch agency, and it should be presumed not to be subject to outside review unless there is the clearest indication of congressional intent to do so. But there is no such indication. In fact, the exact opposite is the case: clearance determinations were not subject to outside review prior to the adoption of the CSRA; the text and history of the CSRA offer no evidence that Congress intended to change this; and the statutory procedures for review of adverse actions are so plainly inappropriate to review of security clearance determinations that Congress could not have intended the MSPB to engage in such review.

A. The Determination Whether To Grant A Security Clearance Is A Sensitive And Inherently Discretionary Determination Committed By Law To Executive Branch Agencies

The President has the constitutional responsibility to classify and control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position in the Executive Branch that will give him access to such information. This authority of the President exists quite apart from any explicit congressional grant. It flows directly from the constitutional vesting of the "executive Power" in the President and the President's powers as "Commander in Chief of the Army and Navy." U.S. Const. Art. II. See *Cafeteria Workers* v. *McElroy*, 367 U.S. 886, 890 (1961); *United States* v. *Marchetti*, 466 F.2d 1309, 1315 (4th Cir.), cert. denied, 409 U.S. 1063 (1972). As Chief Judge Markey noted in his dissent in this case (Pet. App. 37a), "[t]he protection of classified information is an executive responsibility flowing from the President's constitutional mandate to provide for the national defense."

This Court has, on numerous occasions, recognized the government's "compelling interest" in withholding national security information from unauthorized persons in the course of executive business (*Snepp* v. *United States*, 444 U.S. 507, 509 n.3 (1980) (per curiam)). See, *e.g.*, *United States* v. *Robel*, 389 U.S. 258, 267 (1967); *United States* v. *Reynolds*, 345 U.S. 1, 10 (1953); *Chicago &*

Southern Air Lines, Inc. v. *Waterman Steamship Corp.*, 333 U.S. 103, 111 (1948); *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936); *Totten* v. *United States*, 92 U.S. 105, 106 (1875). The authority and the solemn obligation to protect such information fall on the President as head of the Executive Branch and Commander in Chief. As explained by Justice Stewart in his concurring opinion in *New York Times Co.* v. *United States*, 403 U.S. 713, 729-730 (1971):

> [I]t is the constitutional duty of the Executive—as a matter of sovereign prerogative and not as a matter of law as the courts know law—through the promulgation and enforcement of executive regulations, to protect the confidentiality necessary to carry out its responsibilities in the fields of international relations and national defense.

Since World War I, the Executive Branch has engaged in systematic efforts to protect national security information by means of a classification system, requiring documents to be labelled—and access to them restricted—according to their sensitivity (see generally *Developments in the Law—The National Security Interest and Civil Liberties*, 85 Harv. L. Rev. 1130, 1193-1194 (1972)). Originally, these efforts were limited to the military. But after World War II numerous civilian agencies including the CIA, the NSA, and the Atomic Energy Commission were entrusted with gathering, protecting, or creating information bearing on our national security. In a series of executive orders, therefore, Presidents have sought to protect sensitive information and ensure its proper classification throughout the Executive Branch by delegating this responsibility to the heads of those agencies whose functions involve the generation or use of sensitive information. See Exec. Order No. 10,290, 3 C.F.R. 790 (1949-1953 Comp.); Exec. Order No. 10,501, 3 C.F.R. 979 (1949-1953 Comp.); Exec. Order No. 11,652, 3 C.F.R. 154 (1972 Comp.); Exec. Order No. 12,065, 3 C.F.R. 190 (1979); Exec. Order No. 12,356, § 4.1(a), 3 C.F.R. 166 (1982 Comp.).[7]

The point of a classification system is to limit access to sensitive documents and installations to those individuals who have been granted security clearances for that level of classification and who need the access in order to perform their duties. Exec. Order No. 12,356, § 4.1(a), 3 C.F.R. 166 (1982 Comp.). Accordingly, the President has required the heads of all executive agencies to establish personnel security programs to protect national security information. Exec. Order No. 10,450, § 2, 3 C.F.R. 936 (1949-1953 Comp.). Pursuant to this directive, every department and agency of the Government classifies its jobs in three categories: critical sensitive, noncritical sensitive, and nonsensitive. Different types and levels of clearance are required depending upon the position sought. All government appointments are expressly made subject to a background investigation, but the scope of that investigation varies "according to the degree of adverse effect the occupant of the position sought to be filled could bring about, by virtue of the nature of the position, on the national security" (Exec. Order No. 10,450, § 3, 3 C.F.R. 937 (1949-1953 Comp.)).

No individual has a "right" to a security clearance. Under long established principles, the grant of a security clearance requires an *affirmative* act of discretion on the part of the granting official based on a high degree of confidence in the grantee. Doubts are necessarily resolved against the individual seeking access to our nation's secrets: it is better that nine persons who might never compromise classified information be denied access to it, than that access be granted to one person who does. The general standard therefore is that a clearance may be granted only when "clearly consistent with the interests of the national security." See, *e.g.*, Exec. Order No. 10,450, §§ 2, 7, 3 C.F.R. 936, 938 (1949-1953 Comp.); OPNAVINST 5510.1F, para. 16-100(1); 10 C.F.R. 710.10(a) (Department of Energy regulation); 32 C.F.R. 156.3(a) (Department of Defense regulation); Department of Defense Regulation 5200.2-R, para. 6-100(a) (Dec. 1979).

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[7] Congress has recognized the validity of these executive actions. For example, the Act of Jan. 12, 1938, ch. 2, § 1, 52 Stat. 3 (codified as amended at 18 U.S.C. 795(a)), made it a crime to make any photograph, sketch, or representation of any military or naval installations or equipment designated as sensitive by the President. See also 50 U.S.C. 783(b) (unlawful for government employee to communicate classified information to agent of foreign government without authorization). And Congress explicitly exempted from the disclosure requirements of the Freedom of Information Act information authorized "by an Executive order to be kept secret in the interest of the national defense or foreign policy." 5 U.S.C. 552(b)(1)(A). See also 5 U.S.C. 552b(c)(1) (exception from Sunshine Act for meetings involving classified information); 5 U.S.C. 2302(b)(8)(A) (exception to whistleblower protection for employees who disclose classified information).

A clearance determination, it should be stressed, is not a judgment of an individual or his past conduct. It is an attempt to predict his future behavior, to assess whether he might, through disloyalty or venality or carelessness or under the compulsion of circumstances beyond his control, compromise sensitive information. The prediction may be based upon the individual's past or present conduct; but it may also be based upon concerns unrelated to an individual's conduct, such as whether he has close relatives residing in a country that is hostile to the United States (see, *e.g.*, OPNAVINST 5510.IF, para. 16-102(2)(*l*)). As then Judge Scalia explained in *Molerio* v. *FBI*, 749 F.2d 815, 824 (D.C. Cir. 1984):

> To receive a "top secret" clearance is assuredly a badge of loyalty; but to be denied it on unspecified grounds in no way implies disloyalty or any other repugnant characteristic—as is shown by the evidence in this case that the mere fact that one has relatives in a hostile country may be considered a basis for denial.

It is possible to state both general considerations (*e.g.*, "loyalty, reliability, and trustworthiness" (see OPNAVINST 5510.1F, para. 16-100(1)(b)) on which the decision is based and some specific facts that are pertinent (*e.g.*, "criminal or dishonest conduct," "deception or fraud in applying for enlistment or appointment," "use of intoxicating beverages to excess," other "conduct that indicates poor judgment" (see OPNAVINST 5510.1F, para. 16-102)). But it is often not possible to identify, much less quantify, all of the factors that make it impossible to reach the necessary affirmative conclusion in a particular case. The attempt to divine not only the individual's future actions, but those of outside, unknown influences renders the "grant or denial of security clearances * * * an inexact science at best." *Adams* v. *Laird*, 420 F.2d 230, 239 (D.C. Cir. 1969), cert. denied, 397 U.S. 1039 (1970).

Such predictive judgments must be made by those with the necessary expertise in protecting classified information. For "reasons * * * too obvious to call for enlarged discussion" (*CIA* v. *Sims*, 471 U.S. 159, 170 (1985)), the protection of classified information must be committed to the broad discretion of the agencies responsible for such information, and this must include broad discretion to judge who may have access to it. It is not reasonably possible for an outside, nonexpert body to review the substance of such a judgment and decide whether, under the "clearly consistent" standard, the agency should have been able to make the necessary affirmative prediction with the necessary confidence. No such outside body can know or evaluate all of the relevant facts and circumstances, including the nature of the information likely to be available to the occupant of a particular position, the ways in which it could be compromised, the unauthorized or hostile persons who may be interested in obtaining it, the damage that could result if it were disclosed, and the factors that may lead a particular individual to compromise it. Nor can such a body determine what constitutes an acceptable margin of error in assessing the potential risk that confidential information will be compromised.

Accordingly, this Court has acknowledged that with respect to employees in sensitive positions "there is a reasonable basis for the view that an agency head who must bear the responsibility for the protection of classified information committed to his custody should have the *final say* in deciding whether to repose his trust in an employee who has access to such information." *Cole* v. *Young*, 351 U.S. 536, 546 (1956) (emphasis added) (dictum).[8] See also *Adams* v. *Laird*, 420 F.2d at 239 (the standard to be observed in security clearance determinations "is for the President to make in the discharge of his executive functions"); *Greene* v. *McElroy*, 254 F.2d 944, 949 (D.C. Cir. 1958), rev'd on other grounds, 360 U.S. 474 (1959) ("wide latitude in designating persons qualified for access to classified defense information" is a "necessary adjunct to the power and duty to defend the security of the Nation"); *Vitarelli* v. *Seaton*, 253 F.2d 338, 342-343 (D.C. Cir. 1958), rev'd on other grounds, 359 U.S. 535 (1959).[9]

In sum, the Board here exhibited "a proper Board concern against treading into areas which are sensitive by virtue of their national security implications" (Pet. App. 52a). National security matters, as this Court has recognized, are "the province and responsibility of the executive." *Haig* v. *Agee*, 453 U.S. 280, 293-294, 304 (1981).

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[8] In *Cole*, the Court ruled that the Act of August 26, 1950, as extended to other departments and agencies by Executive Order No. 10,450, did not authorize the dismissal of an employee from a nonsensitive position (351 U.S. at 536). In the present case, there is no doubt that the position in question is a sensitive one. This case does not present the question whether it is ever appropriate for the MSPB to review an agency's determination that a position is a sensitive one.

[9] The reversal in *Greene* was based on the absence of presidential or congressional authorization for the procedure leading to the dismissal. The reversal in *Vitarelli* was based on procedural flaws in the dismissal. This Court did not contradict the court of appeals' statements in those cases that the merits of security clearance determinations are unreviewable.

"As to these areas of Art. II duties the courts have traditionally shown the utmost deference to Presidential responsibilities." *United States* v. *Nixon*, 418 U.S. 683, 710 (1974). Absent an unambiguous grant of jurisdiction by Congress, courts have traditionally been reluctant to intrude upon the authority of the executive in military and national security affairs. See, *e.g.*, *Orloff* v. *Willoughby*, 345 U.S. 83, 93-94 (1953); *Burns* v. *Wilson*, 346 U.S. 137, 142, 144 (1953); *Gilligan* v. *Morgan*, 413 U.S. 1, 10 (1973); *Schlesinger* v. *Councilman*, 420 U.S. 738, 757-758 (1975); *Chappell* v. *Wallace*, 462 U.S. 296 (1983).[10]

The court of appeals' contrary holding—that although there is no evidence in the text of the CSRA there is a "strong presumption" in favor of MSPB review of security clearance determinations—puts the matter backwards. In matters relating to national security, review by an outside body is not authorized absent a clear statement of congressional intent to do so: "Having never specifically granted MSPB jurisdiction to conduct hearings on security clearances, Congress has not signaled an intent that MSPB should use the jurisdiction it was granted as authority to inject itself into that sensitive area committed to the Executive branch." Pet. App. 34a (Markey, J., dissenting). The evidence in this instance, which we review below, in fact shows that congressional intent was quite the contrary.

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[10] The authority of the Executive Branch is perhaps at its apogee with respect to controlling access to military installations. See *Cafeteria Workers* v. *McElroy*, 367 U.S. at 890, 892. In its capacity as "proprietor, to manage the internal operation of an important federal military establishment," this Court has stressed that "the Federal Government * * * has traditionally exercised unfettered control." *Id.* at 896.

B. The Text And History of the Civil Service Reform Act, The "Nature Of The Administrative Action Involved" In Security Clearance Determinations, And The Nature Of The Statutory Procedures For Review Of Adverse Actions Demonstrate That Congress Could Not Have Intended To Subject Security Clearance Determinations to MSPB Review

The issue in this case is one of statutory construction and "at bottom * * * turns on congressional intent" (*Clarke* v. *Securities Industry Ass'n*, No. 85-971 (Jan. 14, 1987), slip op. 11). "[A]ll indicators helpful in discerning that intent must be weighed" (*ibid.*), including the "express language [of the statute,] the structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved" (*Block* v. *Community Nutrition Institute*, 467 U.S. 340, 345 (1984)). All indicators in this case demonstrate that Congress could not have intended to subject security clearance determinations to MSPB review.

1. *The CSRA Does Not By Its Terms Provide For MSPB Review of Security Clearance Determinations*

A security clearance determination by an executive agency is conducted in accordance with Executive Order No. 10,450 and the regulations of the agency in question. The Department of Defense, for example, has mandated procedures for all the military branches and administrative agencies within the department. DOD Regulation 5200.2-R, para. 8-201 (Jan. 1987). DOD civilian, military and contractor personnel facing denial or revocation of a clearance are entitled, at a minimum, to written notice and a statement of reasons (to the extent permitted by national security); an opportunity to respond in writing; a written answer to the employee's submission stating the final reasons for the adverse determination; and an opportunity to appeal to a higher authority within the agency (*ibid.*; see also DOD Directive 5220.6 (Aug. 12,

1985)). Navy regulations guaranteed all these procedures at the time of respondent's security clearance determination. OPNAVINST 5510.1F, para. 16-105.[11] See also Air Force Regulation 205-32, para. 8-20 (June 26, 1987); Army Regulation 604-5, para. 8-201f and App. C, Annex A, para. 15. Civilian agencies dealing with sensitive information have similarly comprehensive procedures. See, *e.g.*, 10 C.F.R. 710.10(a) (Department of Energy); 10 C.F.R. Pt. 10 (Nuclear Regulatory Commission).[12]

The CSRA plainly does not confer general jurisdiction on the MSPB to review security clearance determinations. Under 5 U.S.C. 7513(d), the MSPB has jurisdiction to review "adverse actions," a term limited to removals, suspensions for more than 14 days, reductions in grade or pay, and furloughs of 30 days or less. 5 U.S.C. 7512. The denial or revocation of a security clearance is not an "adverse action," and in itself is clearly not subject to Board review.[13]

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[11] The Navy's Personnel Security Appeals Board was created on July 20, 1983, in time for respondent to pursue his appeal to that Board, which affirmed the denial of his clearance on September 1, 1983. On April 20, 1984, even more comprehensive adjudicatory guidelines were incorporated into a revised Naval Instruction, OPNAVINST 5510.1G, Chapter 22 and exhibits to Chapter 22. The Personnel Security Appeals Board was at that time incorporated in para. 22-3. Exhibit 22B explains the Board's composition, purpose and procedures.

[12] Internal Navy procedures often result in reversal or modification of an initial determination to deny or revoke a clearance. During the period January 1, 1982 through June 30, 1987, the Navy issued a total of 493 letters of intent to deny or revoke a security clearance. In 84 cases, after an employee responded to the letter of intent, the clearance was granted or continued in effect because the employee provided sufficient additional information. In 92 additional cases, initial decisions were reversed on the employee's timely appeal within the Navy and the clearance granted. In 53 instances, the employee was reassigned or transferred or decided to resign, thus eliminating the need for a final security determination. Memorandum from the Director, Department of the Navy Central Adjudication Facility to the Director, Office of Civilian Personnel Management (July 9, 1987). Since January 1, 1982, there have been 55 removal actions in the Navy based solely on the denial or revocation of a security clearance. Memorandum from the Director, Labor and Employee Relations Division to the Office of Counsel of the Office of Civilian Personnel Command (July 10, 1987).

When one of the requirements of a government position is the maintenance of a security clearance, an employee whose required clearance is denied or revoked may be removed "for cause" under 5 U.S.C. 7513(a). Under that section the employee is entitled to "30 days' advance written notice * * * stating the specific reasons for the proposed action," an opportunity to respond and be represented by counsel, a "written decision and the specific reasons therefor," and an appeal to the MSPB. The MSPB may determine whether cause for removal existed: that is, it may determine whether the security clearance was in fact an agency requirement for the job, whether the clearance was in fact denied or revoked, and whether transfer to a nonsensitive position was feasible.

Nothing in the CSRA directs or empowers the MSPB to go beyond reviewing whether cause for removal existed to examine the merits of the otherwise unreviewable underlying security clearance determination. We agree with the Board that it may examine whether the agency *made* such a determination, that is, whether the agency had procedures for denying or revoking clearances and whether the procedures were followed. The Board also could, in an appropriate case, find that a determination was not validly made because the employee was not afforded procedural protections guaranteed to him by the agency's regulations (such as notice, a statement of reasons for the proposed denial or revocation, and an opportunity to respond). But the merits of the security clearance determination, like the substance of many other agency decisions that may lead immediately or eventually to an employee's failure to qualify for a job, are not subject to MSPB review.

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[13] The denial or revocation of a security clearance need not, and quite commonly does not, lead to any "adverse action." In the ordinary case where the clearance proceeding is conducted before a government employee is placed in a sensitive position, an individual who is not cleared is simply turned down for the job in question. An individual who already occupies a sensitive position when a clearance is denied or revoked may be transferred to a nonsensitive position within the agency at the same grade and pay. In none of such cases is there any occasion for MSPB review.

The Board, affirmed by the Federal Circuit, has repeatedly ruled that it does not have jurisdiction to review the merits of agency personnel decisions (especially military decisions) that do not constitute "adverse actions" merely because a consequence of a decision is that an employee fails to meet the qualifications for his job and therefore becomes subject to removal. For example, in *Zimmerman* v. *Department of the Army*, 755 F.2d 156 (Fed. Cir. 1985), a civilian employee of the Army had challenged her removal resulting from her transfer out of her Army Reserve unit. The MSPB sustained the removal on the ground that after the transfer the employee no longer met the job specifications, but it declined to review the transfer on its merits. Affirming, the court of appeals said that the "Board does not have the jurisdiction to examine military assignments and transfers" (*id.* at 157). Similarly, in *Buriani* v. *Department of the Air Force*, 777 F.2d 674, 677 (Fed. Cir. 1985), the court held that the Board could not examine the reasons for an Air Force Reserve officer's failure to be promoted, even though the nonpromotion caused the individual to be disqualified for, and therefore to be demoted from, his Air Force civilian position. See also *Tennessee* v. *Dunlap*, 426 U.S. 312 (1976) (affirming discharge of a National Guard employee whose job was conditioned on enlistment in the National Guard, without review of the allegedly arbitrary refusal of the National Guard to reenlist the employee in order to circumvent civil service protections).

The Board has also refused to reconsider other discrete proceedings, such as criminal convictions and bar decertifications, that underlie agency adverse actions. See, *e.g.*, *Crofoot* v. *United States Gov't Printing Office*, 21 M.S.P.R. 248, 252 (1984), rev'd on other grounds, 761 F.2d 661 (Fed. Cir. 1985); *McGean* v. *NLRB*, 15 M.S.P.R. 49, 53 (1983). See also *Bacon* v. *HUD*, 757 F.2d 265, 269-270 (Fed. Cir. 1985) (no MSPB authority to probe reasons behind reduction-in-force); *Madsen* v. *Veterans Admin.*, 754 F.2d 343 (Fed. Cir. 1985) (in reduction-in-force related adverse action, no MSPB authority to review merits of agency's prior classification of bumping employee or his qualifications). As the Board said in the instant case, review of the underlying action was inappropriate in those cases because it was "committed to appropriate procedures within the respective entities and, additionally, involve[d] determinations wherein the Board lacks a specific grant of jurisdiction" (Pet. App. 52a).

In the present case, respondent received all appropriate procedures within the Navy prior to the denial of his security clearance. He was given notice of the proposed denial, an opportunity to respond, and a written decision stating the reasons for the denial. Respondent also pursued an appeal to the Personnel Security Appeals Board. See pp. 3-4, *supra*. Because respondent did not qualify for a sensitive position and no nonsensitive positions were available at the Trident Refit Facility, respondent was removed. Upon his removal, respondent was entitled to MSPB review under Section 7513, including a determination that a security clearance was required for his position, that a security clearance was denied in accordance with agency procedures, and that reassignment was not an available alternative. But Section 7513 does not by its terms authorize the MSPB to reassess the merits of the determination to deny a clearance. As Judge Markey noted in his dissenting opinion below (Pet. App. 33a), "[t]he majority's facile leap from the board's general jurisdiction to review removals to the notion that the exercise of that jurisdiction must include authority to review the reasonableness of security judgments, is unnecessary and unwarranted."

2. *The History Of The CSRA Demonstrates That Congress Did Not Intend To Give The MSPB Jurisdiction To Review The Merits Of Security Clearance Determinations*

Prior to the adoption of the CSRA, most federal employees dismissed for cause could pursue an appeal to the Civil Service Commission. We know of no occasion on which the Civil Service Commission, in examining the cause for a dismissal, exercised jurisdiction over security clearance determinations. Nor was there any other form of outside substantive review of security clearance decisions for government employees prior to adoption of the CSRA. The legislative history of the CSRA clearly demonstrates that Congress did not intend to grant the MSPB broader jurisdiction than the Civil Service Commission in this respect. Congress created the Merit Systems Protection Board to take over the adjudicatory functions of the Civil Service Commission; with certain specifically enumerated exceptions, those functions passed from the Civil Service Commission to the MSPB unchanged. No exception was made to permit review of security clearance determinations.

Prior to the adoption of the CSRA, competitive service employees had the right, under Section 6 of the Lloyd-LaFollette Act, ch. 389, 37 Stat. 555 (codified as amended at 5 U.S.C. (1964 ed.) 652) to be dismissed only for cause. Such employees also had a right, but only by Executive Order, to appeal a dismissal to the Civil Service Commission. Exec. Order No. 10,988, 3 C.F.R. 521 (1959-1963 Comp.); Exec. Order No. 11,491, 3 C.F.R. 191 (1969 Comp.). Preference-eligible veterans had by statute both the right to be discharged only "for such cause as will promote the efficiency of the service" and the right "to appeal to the Civil Service Commission." Veterans' Preference Act of 1944, ch. 287, § 14, 58 Stat. 390 (codified as amended at 5 U.S.C. (1964 ed.) 863).

We have found no instance in which the Commission, in the course of reviewing the "cause" for a removal, under took to review the merits of a security clearance determination, even where denial of a clearance was the cause for the removal.[14] Indeed, by 1978, when the CSRA was adopted, there had never to our knowledge been any case in which a denial of a security clearance to a government employee had been reviewed on the merits by any outside body. It was well established that an agency's decision to deny such a security clearance was not subject to outside substantive review. As the D.C. Circuit had put the matter, "in the case of a Government employee the courts will not inquire into the merits of a dismissal [for want of a security clearance]: they will inquire whether required procedures have been observed, or an applicable statute violated, but they will not—for example—attempt to determine whether an employee is or is not a "security risk," or is "untrustworthy." *Greene* v. *McElroy*, 254 F.2d at 953 (citations omitted); see *Vitarelli* v. *Seaton*, 253 F.2d at 342-343; see also, *e.g.*, *Cafeteria Workers* v. *McElroy*, *supra* (Navy may summarily exclude from its base a civilian concessionaire worker failing to meet

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[14] For a period of approximately six years, pursuant to Exec. Order No. 9,835 (March 21, 1947), 3 C.F.R. 627 (1943-1949 Comp.), the government had in place a Loyalty Program for all federal employees, under which each agency and department head was authorized to remove any officer or employee on grounds relating to loyalty. The decisions of the agency heads were reviewable on the merits by a specialized division of the Civil Service Commission called the Loyalty Review Board, but only "for an advisory recommendation." Exec. Order No. 9,835 Pt. II, para. 3. "The final decision rested with the Administrator." *Kutcher* v. *Gray*, 199 F.2d 783, 787 (D.C. Cir. 1952). Cf. *Cole* v. *Young*, 351 U.S. at 544 n.7. It bears emphasis that "loyalty" is quite a different matter than the constellation of considerations appropriately underlying the determination to grant a security clearance. See pp. 18-19, *supra*.

Executive Order No. 9,835 was revoked by Executive Order No. 10,450, § 12 (April 27, 1953). Section 11 of that Order called for the elimination of the Loyalty Review Board and expressly provided that after the effective date of the order, "the Loyalty Review Board * * * shall not accept agency findings for review, upon appeal or otherwise."

security requirements); *United States* v. *Marchetti*, 466 F.2d at 1318 (declining to review secrecy classifications).[15]

In *Cole* v. *Young*, *supra*, this Court had occasion to consider the jurisdiction of the Civil Service Commission under the Veterans' Preference Act. The Court expressly noted in that case that doubts as to the loyalty of an employee could constitute "cause" for dismissal under that Act (351 U.S. at 543). The Court further suggested in dictum, however, that when a sensitive position is in question the agency head's determination of who should be granted access to classified information should not be subject to outside, substantive review (*id.* at 546 (emphasis added)):

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[15] In several cases involving employees of defense contractors, courts of appeals had suggested that there must be a "sufficiency of proof of a nexus between the conduct involved and security clearance." *Gayer* v. *Schlesinger*, 490 F.2d 740, 750 (D.C. Cir. 1973); see *Smith* v. *Schlesinger*, 513 F.2d 462 (D.C. Cir. 1975); *McKeand* v. *Laird*, 490 F.2d 1262, 1264 (9th Cir. 1973) (finding "rational nexus"). However, the decisions, to the extent they were in favor of the employees, were based on failure to follow procedures promulgated by the Department of Defense pursuant to Exec. Order No. 10,865, 3 C.F.R. 398 (1959-1963 Comp.). Because the plaintiffs were employees of defense contractors, no question of statutory rights to civil service review was involved.

The government concurred in the application of the *Gayer* "sufficient proof to support a rational nexus" standard in these cases. As we stated in our certiorari petition (at 12-13 n.9), we believe that this was error. The nature of security clearance determinations does not differ from government employment to private sector employment; the same standard—"clearly consistent with the national interest"—applies (Exec. Order No. 10,865, § 2, 3 C.F.R. 399 (1959-1963 Comp.)) as do the same general and specific factors that must be weighed in the access determination (see, *e.g.*, DOD Regulation 5220.22-R, para. 2-320 (Feb. 1984); Dep't of Energy, 10 C.F.R. 710.10). While we agree that an individual is, as a general matter, entitled to (and is afforded under Navy and other agency regulations) notice, a statement of reasons for the denial of a clearance, and an opportunity to respond, the "rational nexus" standard leads, as it led the D.C. Circuit in *Hoska*, see n.5, *supra*, to blatant second-guessing of an agency's determination that a constellation of facts makes it impossible to make the affirmative determination necessary to grant a security clearance.

> [T]here is a reasonable basis for the view that an agency head who must bear the responsibility for the protection of classified information committed to his custody should have *the final say* in deciding whether to repose his trust in an employee who has access to such information.

The CSRA replaced the Civil Service Commission with two new agencies. The Office of Personnel Management assumed the Commission's personnel management and agency advisory functions, and the MSPB was given the function of adjudicating employee appeals and ensuring compliance with the CSRA. See S. Rep. 95-969, 95th Cong., 2d Sess. 1, 3, 5, 24, 28 (1978).[16] But the CSRA did not effect any general enlargement of employees' rights to obtain review of adverse actions. To the contrary, the legislative history of the CSRA explicitly states that, with certain specifically enumerated exceptions, the new statute merely unified and codified existing appeal rights (*id.* at 48):

> Subsection (a) [of Section 7511 of title 5, United States Code] provides a statutory basis for the procedural protections and appeal rights now granted employees in the competitive service * * *. Protections against arbitrary or capricious actions have become established by practice and Executive Order—but not by statute—as a basic right of competitive service employees. * * * Subparagraph (1)(B) of subsection (a) reaffirms procedural protections and appeal rights of preference eligibles [*i.e.*, veterans] in the excepted service.

See also *Civil Service Reform: Hearings Before the House Comm. on Post Office and Civil Service*, 95th

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[16] The two agencies had been created by Executive Order in anticipation of the CSRA. See Reorganization Plan No. 2 of 1978, *reprinted in* 7 U.S. Code Cong. & Admin. News 9801-9807 (1978).

Cong., 2d Sess. 13 (1978) (remarks of Alan K. Campbell, Chairman, U.S. Civil Service Commission) ("the right to appeal from adverse actions remains not substantially changed from the current system").

When the Senate and House committees listed the major changes wrought by the CSRA, they gave no indication that agency security clearance determinations were now to be subject to review. See S. Rep. 95-969, *supra*, at 46, 52; H.R. Rep. 95-1403, 95th Cong., 2d Sess. 21-22 (1978). With respect to adverse actions, the House Committee on Post Office and Civil Service explained that it recommended and made only two major changes to the appeal rights of federal employees as they existed prior to the CSRA. First, it eliminated "reduction in rank" from the definition of adverse action,[17] and, second, it included suspensions of more than 14 days in that definition. H.R. Rep. 95-1403, *supra*, at 22.[18] Aside from these changes, the legislative history indicates that Congress intended simply to codify, and transfer to the jurisdiction of the MSPB, the appeal rights federal employees already had. No new right to substantive review of security clearance determinations is mentioned. There is no suggestion that the MSPB is to conduct substantive review of matters that were beyond the reach of its predecessor.

3. *The "Nature of the Administrative Action Involved" Further Indicates That Congress Did Not Intend The MSPB To Review Security Clearance Determinations*

The grant of a security clearance is inherently discretionary. It requires an affirmative determination that the recipient's access to confidential information would be

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[17] Reduction in rank "involves a change in an employee's relative position in his agency which does not involve a reduction in pay or grade" (H.R. Rep. 95-1403, *supra*, at 22).

[18] Under prior law, suspensions of less than 30 days were not considered adverse actions (H.R. Rep. 95-1403, *supra*, at 22).

"clearly consistent with the interests of the national security." That prediction "involve[s] a complicated balancing of a number of factors which are peculiarly within [the agency's] expertise" (*Heckler* v. *Chaney*, 470 U.S. 821, 831 (1985)). It requires not only an assessment of the character, circumstances and past conduct of the applicant, but also a judgment as to what constitutes an acceptable margin of error in light of the sensitivity of the information in question. See Exec. Order No. 10,450, § 3, 3 C.F.R. 937 (1949-1953 Comp.). It must ultimately be based on the subjective judgment of those expert in national security matters generally and in the particular security problems the agency faces. This calculus will vary depending, inter alia, upon the agency's mission, the particular project in question, and the degree of harm that would be caused if the project is compromised.[19]

No outside, nonexpert body can effectively review such determinations, because there is, at bottom, no law to apply. Congress has not provided any standards by

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[19] In many ways, the decision whether to grant a security clearance is like the decision whether the disclosure of certain information might compromise an intelligence source or method. Each such decision "will often require complex political, historical, and psychological judgments." *CIA* v. *Sims*, 471 U.S. at 176. The weighing of these factors requires the decision-makers to "be familiar with 'the whole picture * * *.'" *Id.* at 179 (citation omitted). As this Court has observed, "[w]hat may seem trivial to the uninformed, may appear of great moment to one who has a broad view of the scene and may put the questioned item of information in its proper context." *Id.* at 178 (citations and original quotation marks omitted). See also *Halperin* v. *CIA*, 629 F.2d 144, 150 (D.C. Cir. 1980) (random bits of information "may aid in piecing together other bits of information even when the individual piece is not of obvious importance in itself"). Just as "courts are * * * ill-equipped to become sufficiently steeped in foreign intelligence matters to serve effectively in the review of secrecy classification in that area," *United States* v. *Marchetti*, 466 F.2d 1309, 1318 (4th Cir.), cert. denied, 409 U.S. 1063 (1972), so too both courts and the MSPB are ill-equipped to review the determinations of who may have access to such classified information.

which the MSPB could evaluate the policy judgments of the Executive Branch agencies charged with safeguarding the national security. See *Greene* v. *McElroy*, 254 F.2d at 953:

> [F]or a court to hear de novo the evidence as to Greene's fitness to be assigned to a particular kind of confidential work would be a bootless task, involving judgments remote from the experience and competence of the judiciary. Indeed, any meaningful judgment in such matters must rest on considerations of policy, and decisions as to comparative risks, appropriate only to the executive branch of the Government.

See also *Adams* v. *Laird*, 420 F.2d at 239. The decision whether to grant a security clearance is one committed by "practical necessit[y]"—and by Congress's decision not to provide "judicially discoverable and manageable standards for resolving it" (*Baker* v. *Carr*, 369 U.S. 186, 217 (1962))—to agency discretion. Cf. *CIA* v. *Sims*, 471 U.S. at 169. As Judge Markey stated below (Pet. App. 32a (emphasis in original)): "There is no fact dispute and no law to apply to the Navy's judgment. *All* that remains is the possible substitution of MSPB's judgment."

This Court stressed in *Heckler* v. *Chaney*, 470 U.S. at 830, that "review is not to be had if the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion." That stricture applies with redoubled force here. The MSPB, as it itself recognized, has not been given the standards—because Congress plainly did not intend it to have the authority—to review security clearance determinations of Executive Branch agencies.

4. *The Standard Of Review Chosen By Congress For MSPB Review Of Adverse Personnel Actions Could Not Have Been Intended To Apply To Security Clearance Determinations*

The standard for MSPB review of removals, prescribed in 5 U.S.C. 7701(1)(1)(B), is so obviously inappropriate for review of the merits of security clearance determinations that Congress cannot have intended to require review under that section. Section 7701(c)(1)(B) provides that the agency's decision shall be sustained only if it is "supported by a preponderance of the evidence." However, as Congress was well aware when it enacted that section, a security clearance may only be *granted* if it is "clearly consistent with the interests of national security." Exec. Order No. 10,450, §§ 2, 7, 3 C.F.R. 936, 938 (1949-1953 Comp.). The agency must make an affirmative determination, and all doubts are to be resolved against granting the clearance and in favor of protecting the national security. It simply makes no sense to ask whether the *failure to grant* a security clearance is supported by a preponderance of the evidence.

In enacting the CSRA, Congress clearly recognized that different standards of review are appropriate to different sorts of agency determinations. For example, Congress provided for review of performance-based dismissals under the substantial evidence standard (see 5 U.S.C. 7701(c)(1)(A)). The rationale for the different standard is expressly stated in the legislative history. Congress required a "lower standard of proof * * * because of the difficulty of proving that an employee's performance is unacceptable." S. Conf. Rep. 95-1272, 95th Cong., 2d Sess. 139 (1978).[20]

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[20] The Committee explained further that "[t]he substantial evidence standard was adopted both because it is clearly a lower standard than now used in performance cases and because it is a generally understood term in administrative law." S. Conf. Rep. 95-1272, 95th Cong., 2d Sess. 139 (1978).

Congress's recognition of the need to adopt a lower standard of proof because of the inherent difficulty of proving unacceptable performance makes it all the more unlikely that Congress intended security clearance determinations to be subject to the higher, preponderance-of-the-evidence standard. As discussed above, the decision to grant or deny a security clearance implicates numerous factors that do not lend themselves to quantitative evaluation. The "correctness" of such a determination will be proved or disproved by future events. As Judge Markey asked in his dissent (Pet. App. 41a (emphasis in original)): "What objective facts can those responsible officials correctly cite to 'prove by a preponderance of the evidence' that this or that employee *will* reveal defense secrets?". Yet, if security clearance determinations are reviewable at all, "preponderance" is clearly the prescribed standard under the CSRA. See 5 U.S.C. 7701(c)(1)(B).

The court of appeals attempted to avoid the implications of its holding that security clearances are subject to Board review by asserting that, as an appellate authority, the Board could not substitute its judgment for that of the agency (Pet. App. 24a). But in seeking thus to give some measure of reassurance about what it was deciding, the court simply ignored the statute it was purporting to interpret. The CSRA clearly requires that MSPB review of agency adverse actions under Section 7701 involve a full evidentiary hearing and de novo review of both factual and legal questions, and the agency must prove the propriety of its action by a preponderance of the evidence before the MSPB. See 5 U.S.C. 7701(a), (c)(1)(B) and (2); *Douglas* v. *Veterans Administration*, 5 M.S.P.B. 313, 316-317 (1981). The fact that this procedure is obviously unsuited to review of the merits of security clearance determinations proves not that the courts should redesign that procedure but that Congress did not intend to subject security clearance determinations to Board review.

The decision of the presiding official in this case is illustrative of the consequences of the court of appeals' ruling. The factual allegations on which the denial of respondent's security clearance was based were not disputed. They were, in any event, documented in law enforcement and judicial records.[21] Nevertheless, the presiding official ruled, in essence, that the Navy had not satisfied *her*, by a preponderance of the evidence, that the determination that those undisputed facts warranted denial of a security clearance was "reasonable" (Pet. App. 64a-66a). In other words, she substituted her judgment of the requirements of national security for that of the Navy. Such an approach to the question would only be appropriate if the CSRA had, without expressly saying so, changed both the standard for granting security clearances and the identity of the decisionmaker.[22]

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[21] "Egan does not challenge any fact in the listing of his 14 years of arrests and criminal acts and alcoholism—he simply disagrees with the Navy's evaluation, its *judgment*, made in light of those facts." Pet. App. 26a (Markey, J., dissenting) (emphasis in original).

[22] Any substantive review of security clearance determinations is bound to involve such second-guessing, regardless of the standard of review. It is clear, for example, that the D.C. Circuit second-guessed an Executive Branch security clearance determination while purporting to apply a "rational nexus" standard in *Hoska* v. *Department of the Army*, 677 F.2d at 145 (ordering reissuance of clearance because Army failed "to show some specific connection" between "its evidence of [Hoska's] improper or indiscreet conduct" and his "ability to safeguard the information to which the security clearance gave him access"). And for the period just prior to the Board's decision in this case, presiding officials of the Board obviously believed that they had authority to substitute their judgment in security clearance matters for that of the agency, even to the point of ordering agencies to grant or reinstate clearances previously revoked or denied. See *Skees* v. *Department of the Navy*, No. PH07528410257 (June 14, 1984), slip op. 13; *Peterson* v. *Department of the Navy*, No. BN07528410010 (Feb. 14, 1984), slip op. 8; *Irving* v. *Department of the Navy*, No. BN07528410005 (Feb. 3, 1984), slip op. 9.

One further consequence—a reductio ad absurdum—of the court of appeals' decision in this case should be noted. Federal employees are entitled by law to form unions and bargain with respect to "conditions of employment." 5 U.S.C. 7102. Any collective bargaining agreement that results from those negotiations must include a grievance process, with binding arbitration for grievances not satisfactorily settled through negotiations. 5 U.S.C. 7121(a)(1). The procedures so specified are to be the exclusive procedures for resolving grievances which fall within the coverage of the agreement. One among several exceptions, however, is for adverse personnel actions taken under the CSRA. In the case of such actions, the employee has the option of proceeding either by way of an appeal to the MSPB, as provided in 5 U.S.C. 7701, or under the negotiated grievance procedure, but not both. 5 U.S.C. 7121(e)(1). If the employee elects the latter option, then the arbitrator has the same jurisdiction to review the adverse personnel action, and applies the same standard of review, as does the MSPB. 5 U.S.C. 7121(e)(2).

Congress cannot have intended to submit the question of whether or not to grant a security clearance to binding arbitration. Yet just that absurdity follows directly if the MSPB has authority to review a clearance denial in the course of reviewing an adverse personnel action based in whole or in part on that denial. Indeed, at least one arbitrator has already so held. Relying on the decision below, an arbitrator reviewing a removal based upon the revocation of a security clearance held that "the merits of the security revocation are subject to arbitral review in this proceeding. Moreover, like other adverse actions, the Employer must establish by a preponderance of the evidence that the incidents relied upon in the revocation actually occurred. It also appears that the same burden of proof is applicable to a finding that there was a nexus between the cited incidents and national security interests." *In re a Controversy between Mare Island Naval Shipyard and Federal Employees Metal Trades Council, Involving the Removal of Edwin Bonwell* 21 (May 18, 1987). Concluding that the Navy had failed to meet this burden, the arbitrator then ruled that since the clearance was not properly revoked, it remains in effect and the employee is entitled to reinstatement with full seniority. *Id.* at 29.

5. *The Process Of MSPB Review Of Security Clearance Determinations Would Itself Threaten National Security*

A final aspect of MSPB review that makes it clear that Congress could not have intended the MSPB to review the merits of security clearance determinations is that, as the Board noted (Pet. App. 52a-53a), the MSPB review process would itself threaten the disclosure of classified information. Even where litigation protections for particular information could be devised, albeit at a cost to adversarial proceedings (see, *e.g.*, *Molerio* v. *FBI*, 749 F.2d 815 (D.C. Cir. 1984) (state secrets privilege)), there would remain a considerable risk that the integrity of personnel security programs would be compromised. When an agency must explain, in case after case, how or why certain factors compelled the revocation or denial of a security clearance, it inevitably will be painting a clear picture to hostile entities of the kinds of conduct that are of concern in security determinations, and thus will increase their ability to penetrate our military and intelligence agencies undetected. Cf. *CIA* v. *Sims*, 471 U.S. at 179 ("It is conceivable that the mere explanation of why information must be withheld can convey valuable information to a foreign intelligence agency."); *Doe* v. *Casey*, 796 F.2d 1508, 1532 (D.C. Cir. 1986) (Buckley, J., dissenting) ("To intrude, however deferentially, into the [CIA's] most sensitive personnel decisions entails the inevitable risk of unwittingly compromising national intelligence operations through the forced disclosure of information whose possible significance a court is not capable of assessing."), cert. granted *sub nom. Gates* v. *Doe*, No. 86-1294 (June 8, 1987).

As this Court long ago noted and recently reaffirmed, " 'public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential and respecting which it will not allow the confidence to be violated." *Weinberger* v. *Catholic Action of Hawaii/Peace Education Project*, 454 U.S. 139, 146-147 (1981) (quoting *Totten* v. *United States*, 92 U.S. at 107). See also *United States* v. *Reynolds*, 345 U.S. 1, 6-8 (1953) (discussing origins of the military or state secrets privilege). This basic principle alone provides sufficient indication that Congress did not intend, sub silentio, to expose security clearance determinations to de novo review by the MSPB. Viewed in conjunction with the other considerations noted above, the proof is overwhelming.

The highly discretionary and judgmental nature of the administrative action involved, the need for special expertise in national security risk assessments, the settled history of nonreview of such decisions, the inappropriateness of the prescribed standard of review, and the attendant risks of compromise in subjecting such determinations to outside review—all these factors compel the conclusion that Congress did not intend the MSPB to review security clearance denials or revocations. Indeed, a congressional subcommittee has itself recently so indicated. In the wake of revelations of espionage by government employees and former employees, the Permanent Subcommittee on Investigations of the Senate Committee on Governmental Affairs held hearings and issued a detailed report on government personnel security programs. S. Rep. 99-230, 99th Cong., 2d Sess. (1986). The Senate Subcommittee specifically disapproved of the recent judicially-imposed move towards outside, nonexpert review of security clearance determinations. In fact, one of the recommendations the Subcommittee made for improving the effectiveness of personnel security programs was that "Congress should consider the need for legislation clearly specifying that the Merit Systems Protection Board is authorized to review employment, as opposed to security, decisions. The Board, whose expertise does not encompass questions of national security, should not be engaged in the denial or reinstatement of security clearances." *Id.* at 20 (recommendation #13).[23]

C. The Availability Of Summary Removal Under 5 U.S.C. 7532 Provides No Support For MSPB Review Of Security Clearance Determinations Under Sections 7512 and 7513

Section 7532 provides that "the head of an agency" may summarily suspend an employee without pay when he considers such action "necessary in the interests of national security" and may remove a suspended employee when, after following specified procedures, he determines that removal is "necessary or advisable in the interests of national security." 5 U.S.C. 7532(a) and (b).[24] A re-

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[23] This recommendation was based on testimony by the Department of Defense raising concerns that, after *Hoska*, its clearance decisions would regularly be second-guessed by the Board. S. Rep. 99-230, *supra*, at 16-17; *Federal Government Security Clearance Programs, Hearings Before the Permanent Subcomm. on Investigations of the Sen. Comm. on Governmental Affairs*, 99th Cong., 1st Sess. 718-725 (1985).

[24] The Senate Committee stated that Congress intended that the removal decision be made by the head of the agency personally, although the initial suspension, hearing and review may be delegated to officials within the agency. See S. Rep. 2158, 81st Cong., 2d Sess. 3 (1950). The Department of the Navy's regulations, consistent with that intent, provide that the Secretary of the Navy must personally make the determination to remove an employee under 5 U.S.C. 7532. See OPNAVINST 5510.1G, para. 22-6(2).

moval under Section 7532 is not reviewable by the MSPB. See 5 U.S.C. 7532(b); 5 U.S.C. 7512(A). The court of appeals correctly recognized (Pet. App. 12a) that Section 7532 is not the exclusive authority for removals involving national security considerations and that an agency may remove an employee for cause, for failure to hold a required security clearance, without invoking Section 7532. The court of appeals said (Pet. App. 18a), however, that the availability of Section 7532 procedures is a "compelling" argument in favor of MSPB review of a security clearance denial in a removal case where Section 7532 is not invoked. That is a non sequitur.

Congress enacted the predecessor of Section 7532 (the Act of Aug. 26, 1950, ch. 803, § 1, 64 Stat. 476) to give the heads of certain executive agencies the power to take immediate action when necessary to protect the national security. See *e.g.*, S. Rep. 2158, 81st Cong., 2d Sess. 2 (1950). See also H.R. Rep. 2264, 80th Cong., 2d Sess. 1 (1948). From the standpoint of both the affected employee and the agency head, it is a drastic remedy. The employee may be suspended summarily, without process and without pay, and may be removed "after such investigation and review as [the agency head] considers necessary." (Permanent employees are entitled, "after suspension and before removal," to notice of charges, an opportunity to respond, and a hearing "by an agency authority duly constituted for this purpose.") Neither the suspension nor the removal is subject to any outside review. An employee removed under Section 7532 is not eligible for any position in the agency and may not be appointed to any position elsewhere in the government without consultation with OPM, which may make a written determination of his eligibility. 5 U.S.C. 7312. On the other hand, from the standpoint of the head of the agency, Section 7532 requires him to act personally and it requires affirmative findings that suspension is "necessary" and then that removal is "necessary or advisable" in the interests of national security.

Section 7532 was not intended to be used routinely, but only when there is an immediate and apparent risk to national security. See H.R. Rep. 2330, 81st Cong., 2d Sess. 3 (1950). See also *Cole* v. *Young*, 351 U.S. at 546. The proponents of the statute gave assurances that it would be used sparingly and cautiously. See, *e.g.*, *Hearings on S. 1561, Before a Subcomm. of the Sen. Comm. on Armed Services*, 80th Cong., 1st Sess. 2, 3 (1948) (Statement of Mark Edwin Andrews, Assistant Secretary of the Navy): "It is our intention to utilize the provisions of this law only in the exceptional cases where no other speedy and sure method is available to protect the national security. * * * I wish to reemphasize that the Navy does not intend to use this summary-dismissal legislation * * * except in the most unusual cases."

The court of appeals concluded (Pet. App. 19a) that respondent would have received more procedural protections under Section 7532 than he received in this case. That conclusion was wrong. In this case, under applicable Navy regulations, respondent received notice of the reasons for the proposed denial, an opportunity to inspect all relevant evidence and to respond to the charges, a written decision, and an opportunity to appeal to the Personnel Security Appeals Board. During this process respondent was retained on full pay status. His removal was subject to MSPB review that provides important protections: it affords the employee an outside check on whether the agency complied with applicable procedures (here including notice, a statement of reasons for the denial, and an opportunity to respond); the MSPB may also consider whether the employee is entitled to reassignment to a nonsensitive position in the same facility or agency. By contrast, if he had been removed under Section 7532, respondent would have received notice "[t]o the extent that the head of the agency determines that the interests of national security permit," a hearing before an agency board, and a decision by the head of the agency. He would have been suspended without pay pending the outcome. He would not have been entitled to any MSPB review at all, and once removed, respondent would have been barred from all employment with the agency.

Section 7532 plainly is not a substitute for the orderly process of determining whether it is "clearly consistent with the interests of national security" to grant a particular employee a security clearance, and the availability of Section 7532 has no logical bearing on whether security clearance determinations should be reviewable on their merits. As noted, Section 7532 is a drastic measure both for the agency head, who must act personally and affirmatively, and for the employee, who must be suspended without pay and receives no review of his removal. The burdens are appropriately different: removal under Section 7532 requires an affirmative finding that removal is "necessary," while the *granting* of a security clearance requires an affirmative finding under the "clearly consistent" standard. Section 7532 is in fact not concerned with security clearances at all: it may be used to remove an employee who does not hold a clearance, or to remove an employee who does hold a clearance without revoking that clearance, but it may not be used routinely in every case where agency officials are unable to make the affirmative judgment necessary to grant an individual a security clearance.

The court of appeals, although recognizing that an employee denied a required security clearance may be removed for cause without invocation of Section 7532,[25] evidently assumed that Section 7532 could be invoked in any case in which the agency wishes to shield its security considerations from outside review on the merits. But that is the wrong answer to the wrong question. Section 7532 is plainly not appropriate in the vast majority of cases where it is appropriate not to grant a security clearance, and in any event the proper question is not whether the agency has any other recourse in an emergency, but whether Congress intended the MSPB, sitting to review a removal under Section 7513, to review the merits of an underlying security clearance determination. To the extent that Section 7532 has any bearing on that question, it reflects a congressional awareness that determinations based on national security considerations are not appropriate for outside review.[26]

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[25] In *Doe* v. *Weinberger*, No. 86-5395 (June 9, 1987), petition for reh'g pending, the D.C. Circuit held that the National Security Agency could not dismiss an employee "for cause" for failure to maintain a security clearance, but must either invoke (and follow the procedures specified in) Section 7532 or invoke a different summary procedure statutorily provided for NSA. That holding, if applicable to the Navy's power to dismiss employees for cause under Section 7513, would conflict with the Federal Circuit's ruling in this case that the Navy could proceed under Section 7513,

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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and would pretermit the question presented to this Court for review.

Doe cannot be correct. First, Section 7513 plainly empowers an agency to dismiss an employee who fails to meet a valid qualification for his job, and it is undisputed that a security clearance is a valid qualification for certain positions, including all positions at the Refit Facility; Section 7532 was designed to give agency heads the power to act swiftly in exigent circumstances, and nothing in its language or history suggests any intention to reduce or qualify an agency's statutory authority to dismiss for cause. Second, for reasons explained in the text, neither the agencies nor their employees should want the drastic procedures authorized by Section 7532 to become the required or routine method of taking adverse action based on security concerns.

Because Doe was employed at NSA, he had, like a nonveteran in the "excepted service," no right of appeal to the MSPB. See 50 U.S.C. 402 note. The D.C. Circuit may have been seeking to supplement what it deemed an inadequate set of remedies for excepted service and similarly situated employees. The question whether it is appropriate for a court to supplement the remedies expressly provided by Congress for excepted service employees is before the Court in *United States* v. *Fausto*, cert. granted, No. 86-595 (Jan. 12, 1987).

[26] In debating and rejecting the suggestion that there should be outside review of removals under the Act of August 26, 1950, Congress expressly noted the risk of compromising sensitive information in the process of defending an agency action before an "independent board" as well as the inappropriateness of such outside board's reviewing an agency's "judgment as to why an employee is a bad security risk." 96 Cong. Rec. 10017 (1950) (remarks of Rep. Murray); see also *id.* at 10021 (remarks of Rep. Cavalcante).

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RESPONDENT'S

BRIEF

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No. 86-1552

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

DEPARTMENT OF THE NAVY, Petitioner

versus

THOMAS M. EGAN, Respondent

On Writ of Certiorari to the United States
Court of Appeals for the Federal Circuit

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Whether, in the course of reviewing the removal of an employee for failure to maintain a required security clearance, the Merit Systems Protection Board is authorized by statute to review the substance of the underlying decision to deny or revoke the security clearance.

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No.86-1552

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

DEPARTMENT OF THE NAVY, *Petitioner*

versus

THOMAS M. EGAN, *Respondent*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT

STATEMENT OF THE CASE

The Respondent would, in essence, adopt the Statement as set forth in Petitioner's brief. Nevertheless, the Respondent wishes to emphasize the following points.

Egan was appointed by the Trident Naval Facility to a position on November 29, 1981. He was subsequently promoted to the position of Labor Leader. Egan *was not* serving a probationary or trial period on the date of his proposed removal. He had worked continuously for the employing facility for approximately twenty months and was clearly an "employee"[1] at the time of his removal.

The employing facility initiated Adverse Action to remove Egan from his position pursuant to 5 U.S.C. § 7511 et seq. The sole "cause" for Egan's removal was "his failure to meet the requirements of [his] position due to denial of [his] security clearance" (C.A. App. 44).[2] Egan's clearance had been denied pursuant to Navy regulations that *do not* provide for a hearing.[3]

There has never been a contention that Egan violated any security procedure, compromised security in any manner, or was disloyal to the United States.

As an employee, Egan could only be removed "for such cause as will promote the efficiency of the service"

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[1] 5 U.S.C. § 7511(1)(A) defines "employee" as "an individual in the competitive service who is not serving a probationary or trial period under an initial appointment or who has completed 1 year of current continuous employment under other than a temporary appointment limited to 1 year or less." There is no contention in this case that Egan was not an employee within the meaning of the statute. Furthermore, during the one year period following his initial appointment and during his probationary period, Egan could have been removed from employment essentially without any appeal rights. *Grigsby* v. *U. S. Dept. of Commerce*, 729 F. 2d 772 (CAFC, 1984).

[2] Citations to the appendix and the record in this brief will be the same as used by Petitioner.

[3] OPNAVINST 5510.1F (June 15, 1981) para. 16-105 (reprinted in C.A. App. pp. 33-34) provides that no adverse personnel security actions be taken unless the individual be given "a written statement of the reasons" for the action, "an opportunity to reply in writing", "a written response—stating the final reasons" for the action and an "opportunity to appeal to a higher level of authority."

(5 U.S.C. § 7513(a)) unless he were removed under certain specific statutory exceptions (see 5 U.S.C. § 7512(A)-(E)).[4]

Nevertheless, the Agency's proposal to remove Egan was based on cause pursuant to § 7511 et seq. Egan appealed his removal to the Merit Systems Protection Board ("MSPB" or "Board"). The Presiding Official found in Egan's favor and the Navy petitioned the Board for review. Review was granted and, in a precedent setting case overruling prior authority,[5] the Board reversed the Presiding Official. Egan sought judicial review before the Court of Appeals for the Federal Circuit. In *Egan* v. *Department of the Navy*, 802 F. 2d 1563 (CAFC, 1986) the Federal Circuit reversed the Board.

Details of the administrative proceedings and the review of those proceedings by the Federal Circuit Court of Appeals are set forth quite adequately in the

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[4] 5 U.S.C. § 7512(A) excludes from the coverage of § 7511 et seq. "a suspension or removal under Section 7532 of this title." Under 5 U.S.C. § 7532, "the head of an agency" may remove an employee when "he determines that removal is necessary or advisable in the interest of national security." In other words, presumably, an agency head need not demonstrate "cause" within the meaning of 5 U.S.C. § 7513(a) in a removal action pursuant to 5 U.S.C. § 7532. An agency need not demonstrate "cause" when a reduction-in-force action is taken under § 3502 or when an action is based on unacceptable performance pursuant to § 4303.

[5] The Board had previously taken a position that it had authority to review the propriety of the denial of the security clearance under *Hoska* v. *Department of the Army*, 677 F. 2d 131 (D.C. Cir. 1982), and *Bogdanowicz* v. *Department of the Army*, MSPB Docket No. PH07528110587 (9/29/83).

Petitioner's brief and duplications will not be made here.

SUMMARY OF ARGUMENT

Initially, and from an overall point of view, it would appear that the Petitioner's primary concern and objection with the Federal Circuit decision is with the belief that the decision will cause an invasion by the MSPB, a congressionally created Board, into areas of executive responsibility; namely, "to protect information whose improper use and disclosure could affect national security."[6] Some of the concerns raised by the Petitioner are certainly legitimate. However, what is absolutely and unequivocally clear, is that Congress had already recognized these concerns and had provided statutory authority for agencies to proceed with personnel actions, including a suspension and removal, under provisions and procedures totally independent of MSPB review or review by any congressionally created board (5 U.S.C. § 7531, et seq.).

The Petitioner's argument that these alternate procedures are harsh measures may be true. However, the removal of an employee and a denial of the right to confront and cross-examine is significantly more damaging. Furthermore, the legislative history of Section 7532 does not bear out its harshness to the degree argued by the Petitioner.

Respondent's argument is essentially the same as that presented to the Federal Circuit. Mainly, if an

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[6] Petitioner's brief, p. 11.

agency seeks to remove an employee pursuant to 5 U.S.C. § 7511, et seq., then *it has chosen* its forum . The MSPB has been mandated by Congress to give full consideration and to adjudicate cases that come before it. The Merit Systems Protection Board should not be permitted to carve out exceptions to the clear mandate of Congress.

There is nothing in the legislative history of the Civil Service Reform Act that would indicate Congress's intent to limit the MSPB's scope of review. To the contrary, the legislative history clearly indicates Congress's concern that employees be given a hearing and full consideration of their appeals.[7]

If agencies do not want to subject their decisions to review when those decisions involve security clearance matters, then they should proceed under the statutes specifically created by Congress to insulate outside review.

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[7] The Respondent would recognize the responsibility of the President with respect to providing for the common defense. However, it should be pointed out that the Petitioner has not raised any concern in this case that any of the applicable statutes granting authority to the MSPB to hear and adjudicate the matters that come before it are in any way in violation of any constitutional provision with respect to separation of powers or otherwise.

ARGUMENT

When an Agency Chooses to Remove an Employee for Cause on the Basis That the Employee Has Been Denied a Security Clearance and Where That Employee Appeals to the Merit Systems Protection Board, the Board Must Review That Removal with the Same Full Process, Standards and Scope of Review as any Other Removal Taken Under 5 U.S.C. § 7511 et seq.

A. The Clear Reading of the Statuory Authorities Mandates Full Review and Consideration of the Appeal by the Board.

Chapter 75 of Title 5 is entitled "Adverse Actions". Subchapter II (5 U.S.C. § 7511 et seq.) relates to Removals for "cause". Subchapter IV relates to Removals based upon "National Security" concerns.

An employee removed for "cause" has the right of appeal to the Merit Systems Protection Board (5 U.S.C. § 7513(d)). An employee suspended under 5 U.S.C. § 7532(a) is entitled to certain pre-removal due process rights, including a *hearing* by an agency authority (5 U.S.C. § 7532(*c*)(3)(C)). However, the employee is not entitled to appeal to the Merit Systems Protection Board.

Chapter 77 of Title 5 is entitled "Appeals" and Chapter 12 of Title 5 relates to the "Merit Systems Protection Board . . .". With respect to the powers and functions of the Board, Congress provided as follows:

> "(a) The Merit Systems Protection Board shall—(1) *hear, adjudicate*, or provide for the *hearing* or *adjudication* of *all matters* within the jurisdiction of the Board . . . ;

> (2) order *any* Federal agency or employee to comply with any order or decision issued by the Board . . ." 5 U.S.C. § 1205(a) (emphasis mine).

There has been no assertion in this case that the MSPB did not have jurisdiction to hear and adjudicate Egan's appeal.

In dealing with the type of hearing that must be provided in a case involving a removal, 5 U.S.C. § 7701, et seq., provides:

> "(a) An employee, or applicant for employment, may submit an appeal to the Merit Systems Protection Board from any action which is appealable to the Board under any law, rule, or regulation. An appellant shall have the right—
>
> (1) *to a hearing* for which a transcript will be kept; and. . . .
>
> (b) The Board may *hear* any case appealed to it or may refer the case to an administrative law judge appointed under section 3105 of this title or other employee of the Board designated by the Board to hear such cases, except that in any case involving a removal from the service, the case *shall be heard* by the Board, an employee experienced in hearing appeals, or an administrative law judge. The Board, administrative law judge, or other employee (as the case may be) shall make a decision after receipt of the written representations of the parties to the appeal and after opportunity for a hearing under subsection (a)(1) of this section . . ." (emphasis mine).

Citing various authorities 73 Am. Jur. 2d, *Statutes,* §194 notes:

> "A plain and unambiguous statute is to be applied, and not interpreted, since such a statute speaks for itself, and any attempt to make it clearer is a vain labor and tends only to obscurity." (*Id.* at 194)

Congress provides no exceptions to the obligation to "hear and adjudicate" and clearly intended that the obligation be mandatory. The statutes are clear and unambiguous.

B. The Legislative History of the Civil Service Reform Act Clearly Indicates Congressional Intent to Insure That an Employee Appealing a Case to the MSPB be Given a Hearing and Full Consideration of His Case.

On March 2, 1978, President Carter transmitted to Congress draft legislation proposing reform in Civil Service. Legislation was introduced in the House (H.R. 11280) and in the Senate (S. 2640). The legislation proposed substantial changes which replaced the Civil Service Commission with the Office of Personnel Management (OPM) and the Merit Systems Protection Board (MSPB).

Section 205 of the Senate bill (S. 2640) relates to Appeals to the MSPB. In S. Rep. 95-969, 95th Cong., 2nd Sess. (1978), the following is noted:

> "This section makes important changes in the procedures governing review by the Board and the courts of adverse actions, such as removals, and other appealable actions taken by an agency. The changes protect the right of employees, recognized by the Supreme Court in *Arnett* v. *Kennedy,* 416 U. S. 134 (1974), to a *full and fair* consideration of their case." *Id.* at 51. (emphasis mine).

Clearly, broad review was intended. The Senate version of the bill also contained language denying an evidentiary hearing where there were no genuine and material issues of fact in dispute. Note the following language proposed in the Senate bill:

> "(C) At any time after the filing of the appeal, any party may move for summary decision. The adverse party shall have a reasonable time, fixed by regulations of the Board, to respond. . . ." *Id.* at 223-224.

The Senate Committee on Governmental Affairs noted that, "Where there is no dispute about the facts, the presiding officer may avoid holding an evidentiary hearing since in these cases a full hearing is unnecessary." (*Id.* at 54). The House version of the bill contained no such provision.

The provision finally adopted (5 U.S.C. § 7701, et seq.), preserves the right to an evidentiary hearing even in cases of the type that would normally be disposed of in a judicial proceeding by way of a Summary Judgment under FRCP 56.

Note the following from the Conference Committee report on the issue:

> "The Senate bill provides that an employee is entitled to an evidentiary hearing before the Merit

> Systems Protection Board unless a motion for summary decision is granted. A motion for summary decision shall be granted if the presiding officer decides that there are no genuine and material issues of fact in dispute. The presiding officer may provide for discovery and oral representation of views, at the request of either party, in connection with a summary decision.
>
> The House amendment contains no provision for summary decision. It provides that an employee has a right to a hearing before the MSPB for which a transcript will be kept and the right to be represented by an attorney or other representative. The conference substitute in section 7701(a) adopts the House provision so that the employee is entitled to a hearing on appeal to the Merit Systems Protection Board. The hearing may be waived by the employee." (S. Conf. Rep. 95-1272, 95th Cong., 2nd Sess. (1978)).

The removal of the "summary" provision is quite significant in light of the proposed limited scope of review announced in *Egan*. In essence, the Board, in *Egan*, found its review to be limited as follows:

(a) Does the position require a clearance?

(b) Has the clearance been denied or revoked?

(c) Were the proper procedures followed in the denial/revocation process?

Certainly, the above questions could easily be answered by way of a single page affidavit by appropriate authority. Congress could not have intended the above to constitute a "full and fair consideration" of a case.

A hearing on the above question would constitute an absurdity. What would there be to hear? What statement of a witness could you cross-examine?

Clearly, the removal of the summary disposition provision from the Senate version of the Act strongly indicates that Congress did not intend that the Board limit its review by providing summary adjudication.

A hearing on the above questions would constitute no hearing at all and certainly would not stand muster against the hearing parameters of the Statute.[5] Congress clearly intended that the decision on appeal be made by a Board employee or an ALJ. Under any appeal where the above questions are to be answered the "decision" has actually already been made by the agency head when he denies or revokes the clearance. Any "independent" review by the MSPB would constitute a waste of time.

C. The Scope of Review Announced by the MSPB in Egan Would, in Essence, Deny an Employee the Rights Clearly Recognized in *Arnett* v. *Kennedy*, 416 U. S. 134 (1974).

An indicated above, Congress clearly intended that the Civil Service Reform Act provide protection and rights that were clearly recognized by the Supreme

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[5] 5 U.S.C. §7701(a) entitles an employee "to a hearing for which a transcript will be kept" and to "be represented by an attorney or other representative." Section 7701 also sets forth the burdens of proof, affirmation defenses and basis for review. The initial decision by the Board is to be made by a Board employee and, in the case of removal, by a Board employee "experienced in hearing appeals" or "an administrative law judge" who shall "make a decision" and provide a copy to the employee.

Court in *Arnett* v. *Kennedy*, 416 U. S. 134 (1974). Historically, the rights of public employees were governed by the "Doctrine of Privilege". In *Bailey* v. *Richardson*, 182 F. 2d 46 (D.C. Cir. 1950), affirmed by an equally divided court, 341 U. S. 918 (1951) (per curiam), the Court affirmed a D.C. Circuit Court of Appeals decision which found civil service employment to be a statutory privilege, not a constitutionally protected right. Gradually, over the years, analysis of the Court under a right versus privilege concept gradually diminished. In *Slochower* v. *Board of Higher Education*, 350 U.S. 551 (1956), the Court held that a public employee's due process rights were violated when he was terminated from his job for invoking a Fifth Amendment right. The employee had refused to respond to certain questions concerning his affiliation with the Communist Party, and the Court found that to require Slochower to answer the questions would place an unconstitutional condition on public employment (*Id.* at 559).

In *Greene* v. *McElroy*, 360 U. S. 474 (1959), the Court was confronted with a petition from a discharged engineer who had been precluded from the continued practice of his profession by the government's denial of a security clearance. In the procedures followed, it was noted that the deciding body "relied on confidential reports which were never made available to petitioner", and "petitioner had no opportunity to confront and question persons whose statements reflected adversely on him or to confront the government in-

vestigators who took their statements." (*Greene, supra,* at 479). Specifically, the issue presented to the Court, in *Greene,* was as follows:

> "The issue, as we see it, is whether the Department of Defense has been authorized to create an industrial security clearance program under which effected persons may lose their job and may be restrained in following their chosen professions on the basis of fact determinations concerning their fitness for clearance made in proceedings in which they are denied the traditional procedural safeguards of confrontation and cross-examination." *Greene, supra,* at 493.

In overriding the decision to revoke Greene's security clearance, Chief Justice Warren, writing for the majority, stated that "[*i*]*n the absence of explicit authorization* from either the President or Congress the respondents were not empowered to deprive petitioner of his job in a proceeding in which he was not afforded the safeguards of confrontation and cross-examination." *Greene,* at 508 (emphasis mine). Citing numerous cases, the Court noted that, "Where administrative action has raised serious constitutional problems, *the Court has assumed that Congress or the President intended to afford* those affected by the action the traditional safeguards of due process." *Id.* at 507 (emphasis mine).

Over the years, the Court progressed with its decisions and gradually eliminated the right/privilege dicotomy . (See *Graham* v. *Richardson,* 403 U. S. 365

(1971)). Writing for the majority, Justice Blackman stated that the Court "now has rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a 'right' or 'privilege'." *Id.* at 374. This decision was followed by other landmark decisions recognizing the property interest in public employment and the corresponding rights of procedural due process in *Board of Regents* v. *Roth*, 408 U. S. 564 (1972); and *Perry* v. *Sindermann*, 408 U. S. 593 (1972); followed by *Arnett* v. *Kennedy*, *supra.*

Arnett clearly recognizes constitutionally protected rights of federal employees.

In *Greene, supra,* the Court specifically held:

> "We decide only that in the absence of explicit authorization from either the President or Congress the respondents *were not empowered* to deprive petitioner of his job in a proceeding in which he was not afforded the safeguards of confrontation and cross-examination."
>
> *Greene, Id.* at 508 (emphasis mine).

Under 5 U.S.C. § 1205, there is no specific congressional authority directing the MSPB to limit its scope of review and deny an employee the traditional safeguards associated with a hearing allowing confrontation and cross-examination.

D. The Availability of Special Statutory Procedures Permitting Summary Removal in the Interest of "National Security" is a Strong Indication That Review Should Not Be Limited by the MSPB.

In *Egan* the Federal Circuit thoroughly analyzed the alternate statutory provisions in Sections 7513 and 7532. Citing *Cole* v. *Young*, 351 U. S. 536 (1956) the Federal Circuit concluded that 5 U.S.C. § 7532 was not the *exclusive* basis for removal based on national security grounds (*Egan, supra* at 1568). In *Cole* the Court recognized the "option" available to agencies noting that The "Lloyd-LaFollette Act" and the "Veteran's Preference Acts" authorize dismissals "for cause" and that the Civil Service Commission had recognized that reasonable doubt as to Loyalty constituted "cause" for dismissal under these Acts. (*Cole, Id.* at 543).

In *Cole* the Court went on to note that the question before them was "not whether an employee *can* be dismissed [for cause] [on loyalty grounds] but only the extent to which the *summary procedures* authorized by the 1950 Act [now 5 U.S.C. § 7531 et seq.] are available" (*Cole, Id.* at 544) (emphasis mine).

Respondent agrees with the finding of the Federal Circuit in this regard and with its specific conclusion.

> "The agency is responsible for selecting the removal procedure in the particular circumstance. Each procedure will entail different benefits and burdens for both the agency and the employee."
> *Egan, supra* at 1569.

There is no indication in the Legislative history of the CSRA that Congress intended in any way to change the availability of summary removal under 5 U.S.C. § 7532. The language of § 7532 was unchanged by the CSRA. Summary removal is still available.

The Petitioner in its brief discusses the procedures set out in 5 U.S.C. § 7532 (Pet. Brief at 41) and characterizes them as harsh. Respondent agrees with the Federal Circuit that the "Board's decision in *Egan* creates the anomalous situation where employees removed for national security reasons under 5 U.S.C. § 7512 would be entitled to less process than those removed under 5 U.S.C. § 7532" (*Egan, supra* at 1572). Of course the procedures under § 7532 are more harsh . . . They are summary in nature. On the other hand, they at least give the effected employee the right to a hearing and an opportunity to clear his record. No such right is available under the agency procedures revoking/denying a security clearance.

CONCLUSION

The Court of Appeals was correct in its analysis and conclusions.

The Merit System Protection Board has been given the direction from Congress to hear and adjudicate cases over which it has jurisdiction. The Board has also been given the authority to direct compliance with its decisions. Congress did not qualify the Boards

Authority in cases involving the interests of national security.

The Judgment of the Circuit Court should be affirmed.

Respectfully Submitted,

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October, 1987

REPLY
BRIEF

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No. 86-1552

In the Supreme Court of the United States

OCTOBER TERM, 1987

DEPARTMENT OF THE NAVY, PETITIONER

v.

THOMAS M. EGAN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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Respondent's job at the Trident Refit Facility entailed physical access to the interiors of nuclear submarines, as well as knowledge of their arrivals and departures. We demonstrated in our opening brief that the President has instructed the defense agencies not to employ any person in a position entailing access to classified information unless doing so is "clearly consistent with the interests of the national security" and that the MSPB, whose mission is not the security of the nation but the protection of employees, properly concluded that it had no authority to review the substance of the Navy's determination to deny respondent a clearance. Respondent and his supporting amici, focusing on respondent's conceded right to MSPB review of his *removal*, argue that an employee would be better protected against overcaution or excessive zeal or error on a defense agency's part if the Navy were required to persuade the MSPB that it was appropriate to deny a clearance. These arguments mistake the objective of the clearance process, which is to deny access to classified information to anyone who *might* deliberately or inadvertently compromise it.[1]

1. The dispute in this case is a narrow one. The President has directed each defense agency not to employ any individual in a sensitive position unless it finds that the "clearly consistent" standard is met. See Gov't Br. 18.[2] The Navy has adopted regulations pursuant to which it designates positions as sensitive, and it has so designated respondent's position.[3] The Navy has also adopted regulations pursuant to which it clears civilian personnel for access to classified information. Respondent has not challenged the validity or constitutionality of these Navy regulations, nor has he contended that the Navy did not follow them in this case.[4] Nor has respondent

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[1] As the Senate Select Committee on Intelligence explained recently, "Clearances should go to individuals whose records demonstrate a clear aptitude for security. That is, their background and personal qualities should show a high sense of responsibility—not just the absence of proved disqualifying factors." *Meeting the Espionage Challenge: A Review of United States Counterintelligence and Security Programs—Report of the Select Comm. on Intelligence*, S. Rep. 99-522, 99th Cong., 2d Sess. 71 (1986).

[2] Respondent (Br. 14) and amicus Bogdanowicz (Br. 17) argue, citing *Greene* v. *McElroy*, 360 U.S. 474, 508 (1959), that the President must "explicit[ly] authoriz[e]" any procedure by which any person may be denied access to a military facility without a trial-type hearing, if the result is that he cannot hold a particular job. *Cafeteria Workers* v. *McElroy*, 367 U.S. 886 (1961), disposes of that claim. In that case (which, like *Greene*, involved a contractor employee), the Court "proceed[ed] on the premise that the explicit authorization found wanting in *Greene* must be shown" (367 U.S. at 890); after stating (*ibid.*) that "both the legislative and executive branches are wholly legitimate potential sources of such explicit authority," the Court found the necessary authorization in Article 0734 of Navy Regulations (as approved by the President), which excluded "tradesmen or their agents * * * except as authorized by the commanding officer" (see 367 U.S. at 892). Sections 2 and 3 of Executive Order No. 10,450 (Pet. App. 77a-78a) are considerably more explicit in their instructions to exclude persons on national security grounds. See also Executive Order No. 12,356, § 4.1, 3 C.F.R. 174 (1983).

[3] The Department of Defense accounts for 94% of all government employee positions requiring security clearances, and the Departments of Energy, Justice, State, and Treasury account for most of the remainder. See *Federal Government Security Clearance Programs: Hearings Before the Permanent Subcomm. on Investigations of the Senate Comm. on Governmental Affairs*, 99th Cong., 1st Sess. 27 (1985) (testimony of Bill W. Thurman, Dep. Dir., National Security and International Affairs Div., GAO). As we have previously observed (Pet. 11), the question whether the MSPB could review the propriety of designating a position as sensitive is not presented in this case. Cf. *Cole* v. *Young*, 351 U.S. 536 (1956).

[4] Respondent has not challenged the MSPB's ruling (Pet. App. 59a) that the Navy afforded him procedural due process in connection with the clearance determination, nor has respondent argued at any stage that the Navy did not follow its own regulations. It appears (see Gov't Br. 4) that after the Director of Naval Civilian Personnel Command determined to deny his clearance, respondent appealed this determination to the Navy's Personnel Security Appeals Board, but the Navy removed him before the Board affirmed the Director's determination. We do not believe this sequence of events, on which neither the MSPB nor the court of appeals commented, has any material bearing on the question presented to this Court.

disputed the fact that, if he was validly denied a clearance, he fails to meet one of the proper requirements of any position at the Trident Facility and may be removed for cause. His only contention is that upon his removal he was entitled to MSPB review of the substance of the Navy's decision to deny him a clearance.

2. As the MSPB stated (Pet. App. 47a-48a), nothing in the language or legislative history of the Civil Service Reform Act of 1978 (CSRA) addresses that contention, and the extensive discussions in the opposing briefs (Resp. Br. 6-11; NFFE Amicus Br. 14-16; Bogdanowicz Amicus Br. 6-26; ACLU Amicus Br. 23-36; AFL-CIO Amicus Br. 27-28) do not set forth any actual evidence on the issue. We argued in our opening brief (at 22-40) that the MSPB's interpretation of the statute as not empowering it to review the substance of a clearance determination is supported by the prior practice of the Civil Service Commission (CSC), the nature of a security clearance determination, and the quite inconsistent nature of MSPB (and arbitrator) review. We will not repeat those arguments here except to respond to three points.

a. Respondent (Br. 11) and two amici (Bogdanowicz Br. 6; NFFE Br. 11) assert that the statute provides for MSPB review of removals without distinguishing between those based on loss of a security clearance and other removals. We agree:[5] the

CSRA, 5 U.S.C. 7512(1) and 7513(d), gave respondent the right to MSPB review of his removal. But the scope of the Board's power, on such review, to overturn other determinations bearing on the employee's qualifications is a different question, not answered by the statute or its legislative history. On that question, the Board followed what are (despite our opponents' contrary assertions (Bogdanowicz Br. 12; ACLU Br. 33)) analogous precedents: *Zimmerman* v. *Department of the Army*, 755 F.2d 156 (Fed. Cir. 1985), in which the court affirmed the Board's action sustaining the removal of a civilian employee of the Army for failure to remain in good standing in her reserve unit, while refusing to review the circumstances of her forced transfer out of the unit; and *Buriani* v. *Department of the Air Force*, 777 F.2d 674 (Fed. Cir. 1985), in which the court affirmed the Board's action sustaining the demotion of a civilian employee of the Air Force for failure to receive a promotion in the Air Force Reserve, while declining to review the merits of the failure to promote. Like the unreviewable collateral decisions in those cases, the Navy's decision in this case not to grant respondent access to its submarines was, we submit, a decision properly committed to the discretion of the defense agency.

Contrary to the claims of amici Bogdanowicz (Br. 8-9) and ACLU (Br. 25-27), a separate and otherwise unreviewable discretionary decision by the employing agency does not become subject to full review on its merits merely because it leads to a removal. The agency decisions involved in *Losure* v. *ICC*, 2 M.S.P.R. 195 (1980) (a "reorganization") and *Ketterer* v. *Department of Agriculture*, 2 M.S.P.R. 294 (1980) (a "reassignment") were both attacked as mere pretexts for otherwise unjustified removals. The Board in each case required the agency to prove that its determination was "bona fide" and not a mere "veil": it said in *Losure* (2 M.S.P.R. at 200) that it would "not allow the circumvention of adverse action procedures where the 'reorganization' has no substance and is in reality a pretext for summary removal"; and it said in *Ketterer*, citing *Losure*, that "agency discretion to reassign may no more properly be invoked as a *veil* to effect an employee's separation than may a reduction in force" (2 M.S.P.R. at 299 n. 8 (emphasis added)). But it said in the same breath that if such an agency action was due to bona fide management considerations, "this Board will not review the management considerations which underlie that exercise of agency discretion" (*ibid.*).[6]

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[5] We strongly disagree with the suggestion of amicus Washington Legal Foundation (Br. 22-26) that the Navy in effect terminated respondent summarily under 5 U.S.C. 7532, so that its actions are not subject to any outside review. Both parties (see Resp. Br. 16), as well as other amici (Bogdanowicz Br. 28; ACLU Br. 21; AFL-CIO Br. 29) agree with the court of appeals (Pet. App. 12a) and the MSPB (Pet. App. 55a-56a) that Section 7532, which was not invoked here, does not bar an agency from removing an employee for cause for failure to maintain a security clearance that is a requirement of his job. That question is presented in *Carlucci* v. *Doe*, petition for cert. pending, No. 87-751 (filed Nov. 4, 1987). We have given respondent a copy of the petition and petition appendix in that case.

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[6] The other cases cited by amici and the court of appeals did not involve any review of agency discretion. *Huber* v. *MSPB*, 793 F.2d 284 (Fed. Cir. 1986), cert. denied, No. 86-354 (Jan. 12, 1987), involved the question whether a particular action constituted a "reduction in force" rather than a "removal action personal to appellants" (793 F.2d at 286), a mixed question of law and fact of jurisdictional significance under 5 U.S.C. 7512. In *Bavier* v. *Department of Transportation*, 4 M.S.P.R. 548 (1981), the question was whether a medically disqualified air traffic controller had become medically fit for duty and hence was AWOL and removable; the Board ordered the Federal Aviation Administration to restore him to leave without pay status because "the Federal Air Surgeon gave no reasons whatsoever for the change" from medically disqualified to medically qualified status (*id.* at 549); it did not—and certainly should not—second guess medical judgments as to fitness to act as an air traffic controller.

No one has suggested that the denial of respondent Egan's security clearance was not motivated by a bona fide concern for security and was a mere pretext for removing him for nonsecurity reasons.

b. Amicus NFFE (Br. 14-15) disputes our contention that the Civil Service Commission—whose review responsibilities, aside from certain specifically enumerated exceptions, passed generally unchanged to the MSPB—did not have power to review the merits of security clearance determinations. They cite two cases, *Cole* v. *Young*, 351 U.S. 536 (1956), and *Karpoff* v. *United States*, 142 Ct. Cl. 93 (1958), in support of their argument. Neither case is on point.[7]

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[7] The holding of *Cole* was that the Act of August 26, 1950, the predecessor of Section 7532, did not authorize an agency (there the Department of Health, Education and Welfare) to remove an employee from a *non*sensitive position (food and drug inspector) on "loyalty" grounds. The Court noted (351 U.S. at 544 n.7) that prior to 1953 a loyalty dismissal was subject to review by the CSC's Loyalty Review Board. (This is discussed in our opening brief (at 28 n.14), where we note that this Board's review function was advisory only and was terminated in 1953.) Nothing in *Cole* suggests that the Civil Service Commission would ever have had power to reverse the Navy's decision, on security grounds, not to clear a particular person to enter a Naval facility.

Karpoff involved a summary removal under the Act of August 26, 1950. Executive Order No. 10,450, § 8(b), gave the Civil Service Commission power to conduct security investigations of employees in cases where the employing agency did not have the resources to do so. (That responsibility has passed in the current version of the Executive Order *not* to the MSPB, the CSC's adjudicative successor, but to the Office

In an unpublished decision that is on point, the Commission's Appeals Review Board itself made clear, shortly after the passage of the CSRA,[8] that it did not believe it had such power. *In re Silver*, No. DC752B90033 (Civ. Serv. Comm'n Nov. 2, 1978).[9] On review of the suspension and removal of an employee for cause following the loss of his security clearance, the Appeals Board stated: "Determinations with respect to security clearances are made by the agencies and this office has no jurisdiction to substitute its judgment for that of the agency in determining whether the appellant was suitable for a clearance" (slip op. 6). The Appeals Board went on, however, to review the procedures afforded by the agency in revoking the clearance and, finding them "fatally procedurally defective," reversed the employee's suspension and removal. That is what the MSPB concluded it had the power to do here.

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of Personnel Management (see Pet. App. 82a).) In *Karpoff*, "the employing agency had no facilities for investigation" and, thus, under Executive Order No. 10,450, § 8(b), "the Civil Service Commission, acting for the agency, made the investigation" (142 Ct. Cl. at 95, 97). The CSC determined that Karpoff should be removed on security grounds but that determination was later reversed on internal CSC review. The Court of Claims ruled that at that point Karpoff was entitled to reinstatement and back pay precisely because "the Civil Service Commission was in effect the agent" of the employing agency in performing its investigation and review (*id.* at 97). As the MSPB itself noted here (Pet. App. 57a n.7), the opinion in no way suggests that the Commission had power to review another agency's denial of a clearance.

[8] The CSRA was enacted on October 13, 1978, and its review provisions were made effective 90 days from that date.

[9] We have lodged copies of this decision (which is recorded only on microfiche) with the Clerk and furnished a copy to respondent's counsel.

c. Four amici argue (ACLU Br. 25-37; Bogdanowicz Br. 4-5, 26-28; NFFE Br. 5-11; AFL-CIO Br. 18-27) that MSPB review of clearance determinations would normally involve "mundane question[s] of fact" (AFL-CIO Br. 18) and would be "neither different nor more difficult than standard Board fare" (ACLU Br. 31). They are wrong for a reason that goes, we think, to the heart of the matter: even where the denial of a security clearance stems from instances of misconduct, the question is not whether the employee "deserves" to be removed for his misdeeds, but whether the agency can predict with confidence that he will not in the future compromise sensitive information.

There will, no doubt, be instances where the agency makes a mistake of fact. But the Navy and other defense agencies have their own strong incentive to avoid mistakes: it is expensive to recruit, train, and clear a replacement for an experienced employee. That is why the Navy and other agencies have established elaborate procedures to avoid mistakes, including insistence on the concurrence of personnel at more than one level in any revocation of a clearance.[10] Requiring the agency to satisfy the MSPB or an arbitrator by a preponderance of the evidence that denial of a clearance is warranted would, no doubt, result in the granting of more clearances, including many to employees who would never in fact compromise sensitive information. But the "clearly consistent" standard established in Executive Order No. 10,450 means that the process of determining whether individuals should be cleared for access to nuclear submarines and other sensitive areas and information should err (if it must) on the side of overexclusion. There is no reason to think that Congress intended in the CSRA to reverse that assumption.[11]

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[10] Statistics cited in our opening brief (at 23 n.12) indicate that Navy procedures often result in reversal or modification of an initial determination to deny or revoke a clearance.

Two amici (NFFE Br. 5-6; ACLU Br. 28) argue that without MSPB review of clearance decisions an agency could arbitrarily deny a clearance as a way of effecting a removal whose real motivation was a different and improper one. But this is certainly not such a case, and there is no reason to think that the risk is a substantial one. As just noted, the Navy and other agencies have their own incentives and procedures to avoid arbitrary clearance decisions. And MSPB review of the removal or other adverse action, which provides an outside check on whether those procedures were properly followed, should be a significant deterrent to subterfuge.

3. Respondent (Br. 11-14) and two amici (NFFE Br. 3-4; ACLU Br. 40-52) contend that due process requires an MSPB hearing on the denial of his clearance. But there is no due process question in this case. Respondent received notice and a full statement of the reasons why the Navy proposed to deny his clearance, and he responded at length, with the assistance of his union. He did not challenge any fact, or ask to cross-examine anyone, or ask to be heard further by the Navy.[12] When he sought review by the MSPB, although the presiding official was willing to consider the merits, respondent twice failed to respond to the Board's notice that a hearing would be convened at his request. The *only* thing respondent has placed in issue in this case is the Navy's *judgment*, based on the written record, that a clearance should be denied.

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[11] Amicus AFL-CIO argues (Br. 12-18) that the 1974 amendment to the Freedom of Information Act (FOIA), 5 U.S.C. 552, authorizing the federal courts to review documents in camera to determine whether they are in fact properly classified and hence exempt from FOIA disclosure, demonstrates that Congress intended MSPB review here. We think the history of the 1974 amendment shows, if anything, the opposite: the 1974 amendment to FOIA inspired vigorous debate in both Houses of Congress, as the AFL-CIO notes (Br. 14-16), and was passed over a presidential veto. It is hardly likely that Congress turned over the far more sensitive matter of security clearances to MSPB review or binding arbitration without saying so and without debate.

Were the question presented whether *the Navy*[13] was obliged to afford an evidentiary hearing in connection with the denial of respondent's security clearance, we would argue strenuously to the contrary. Certainly respondent had no right to such a hearing in connection with the denial of the clearance as such: that point was settled in *Cafeteria Workers* v. *McElroy*, 367 U.S. 886, 894-898 (1961), holding that the Navy could exclude a concessionaire employee from the Naval Gun Factory on unspecified security grounds, without notice, opportunity to respond or explanation, so long as the exclusion was not "patently arbitrary or discriminatory" (367 U.S. at 898).

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[12] Respondent did indicate that he misread the government's standard personnel application form: it asked (in bold face) "Have you *ever* been convicted * * * [of] *any* firearms or explosives offense against the law?" but respondent listed only his two convictions within the last seven years. Respondent also asserted that in his own judgment he was now free of the alcohol problem that by his own statement had afflicted him literally from childhood to his imprisonment in 1980.

[13] No decision of this Court holds that due process requires an evidentiary hearing before a tribunal outside the employing agency. In *Mathews* v. *Eldridge*, 424 U.S. 319, 349 (1976), and *Cleveland Board of Education* v. *Loudermill*, 470 U.S. 532, 546-547 (1985), in upholding the limited pre-denial procedures challenged in those cases, the Court took comfort from the availability of post-denial evidentiary proceedings; in both cases, the tribunal provided was in fact outside the agency, but the Court nowhere suggested that the Constitution required this.

We do not dispute the contention, made primarily by amici (Bogdanowicz Br. 29; ACLU Br. 42) that under *Cleveland Board of Education* v. *Loudermill*, 470 U.S. 532 (1985), respondent had a property interest in his job.[14] But that interest was conditioned *not*, as asserted in *Loudermill*, on prescribed "procedures for its deprivation" (470 U.S. at 539), but on the concededly valid *substantive* requirement (see job description at C.A. App. 3) that respondent obtain a clearance making him eligible to, inter alia, go on board nuclear submarines. *Loudermill* does not hold or suggest that a federal employee is constitutionally entitled to an evidentiary hearing in connection with any determination that he fails to meet one of the substantive qualifications for his job.

The question what process is due a Navy employee in connection with the Navy's determination of his substantive qualifications need not be reached in this case, but the answer, surely, is that it depends on the

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[14] We do dispute the contention (Bogdanowicz Br. 20-21; ACLU Br. 44) that respondent had a relevant "liberty" interest. Respondent was denied a clearance expressly because of his criminal record and history of alcohol abuse, matters that were already a part of the public record for any future employer to consider. His good name and ability to seek employment elsewhere can hardly have been materially affected by the Navy's inability to conclude, based on that record, that it would be "clearly consistent with the interests of the national security" to allow him access to information about nuclear submarines. See *Cafeteria Workers* v. *McElroy*, 367 U.S. at 898; *Molerio* v. *FBI*, 749 F.2d 815, 824 (D.C. Cir. 1984).

circumstances. See *Mathews* v. *Eldridge*, 424 U.S. 319, 334 (1976). Here, we note once again, respondent received, under Navy regulations, notice of the proposed denial of his security clearance (including a written statement of reasons), an opportunity to reply in writing with the assistance of his union, the right to a written response stating the final determination with reasons, and the right to appeal to a higher authority within the Navy (OPNAVINST 5510.1F para. 16-105). He received, under 5 U.S.C. 7513, notice of his removal (stating the specific reasons), the right to respond and be represented, and the right to appeal to the MSPB (including the right to a hearing, which he waived); in that appeal, the MSPB determined that the position required a clearance, that the Navy had in fact denied the clearance, and that in doing so it had satisfied the requirements of due process. The MSPB's decision on these points was subject to judicial review. We suggest that the Court would conclude, upon "analysis of the governmental and private interests that are affected" (424 U.S. at 334), that the process by which respondent was denied a security clearance and subsequently removed amply satisfied constitutional requirements.

4. Respondent (Br. 15-16) and three amici (ACLU Br. 21-23; Bogdanowicz Br. 28-30; AFL-CIO Br. 27-30) argue that the availability of 5 U.S.C. 7532 indicates that Congress intended the MSPB to review the merits of any denial of a security clearance that leads to removal for cause where Section 7532 is not invoked. That is a nonsequitur for the reasons stated in our opening brief (at 40-44). We add two points.

a. Respondent and two amici argue (Resp. Br. 16; AFL-CIO Br. 29; Bogdanowicz Br. 29) that an employee is entitled to a trial-type hearing (albeit after summary suspension without pay) before removal under 5 U.S.C. 7532, and he must therefore be entitled to an MSPB hearing on the merits of the denial of his security clearance in connection with a removal for cause. But even if the premise were clearly correct,[15] the conclusion would not follow; the two procedures are simply different, and afford different protections. Section 7532 provides no process at all before suspension without pay, and no outside review of any kind afterwards. In contrast, the denial of a security clearance under OPNAVINST requires notice, a statement of reasons, and an opportunity to respond *before* action is taken; and any resulting adverse action under 5 U.S.C. 7513 carries the right to MSPB review (including a hearing), which provides a cross-check on whether proper procedures were followed in the denial of a clearance and on whether the suspension or removal was justified by the denial of the clearance.

b. Congress expressly excluded "a suspension or removal under Section 7532" from the definition in 5 U.S.C. 7512 of actions to which the subchapter (providing for MSPB review) applies. There is a similar exclusion in 5 U.S.C. 7121(c), which provides for grievance procedures. Three amici (AFL-CIO Br. 28-29; ACLU Br. 21-23; Bogdanowicz Br. 28-30) argue that the specific reference to Section 7532, instead of a reference to all "matters involving national security" (which had appeared in the Senate version of what became 5 U.S.C. 7121), shows that

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[15] There has been no authoritative determination of what sort of hearing is required under Section 7532. We note that Section 7532(c)(1)(A) provides that the employee is entitled to a statement of reasons only "stated as specifically as security considerations permit." Section 7532(c)(1)(C) then requires only "a hearing, at the request of the employee, by an agency authority duly constituted for this purpose."

Congress intended to provide for review of the substance of clearance decisions unless Section 7532 is invoked. But if the broader language had been used, respondent in this very case would not have been entitled to the important protections afforded by 5 U.S.C. 7513. The fact that Congress chose to exclude *in toto* only actions where Section 7532 is invoked says nothing about the appropriate scope of MSPB review in the case of a removal that is properly before it, as this one was.

For the foregoing reasons, and the reasons stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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Solicitor General

NOVEMBER 1987

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AMICUS CURIAE

BRIEF

(4)

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

DEPARTMENT OF THE NAVY,
Petitioner,
v.
THOMAS M. EGAN,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF OF AMICUS CURIAE THE WASHINGTON LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 86-1552

DEPARTMENT OF THE NAVY,
Petitioner,
v.
THOMAS M. EGAN,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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BRIEF OF AMICUS CURIAE THE WASHINGTON LEGAL FOUNDATION IN SUPPORT OF PETITIONER

INTERESTS OF AMICUS CURIAE

The Washington Legal Foundation ("WLF") is a non-profit public interest law center, based in Washington, D.C., with 85,000 members nationwide. WLF has participated in and has devoted a substantial portion of its resources to cases relating to government regulations and constitutional law. Based upon the interests of its members and supporters, one of WLF's primary goals is the preservation and enhancement of United States national security. On various occasions WLF has represented the interests of over 100 Senators and Congressmen in lawsuits involving national security. E.g., *Goldwater v. Carter*, 444 U.S. 996 (1979); *Edwards v. Carter*, 580 F.2d 1055 (D.C. Cir. 1978), *cert. denied*, 436 U.S. 907 (1978); *Crockett v. Reagan*, 558 F. Supp. 893 (D.D.C. 1982), *aff'd*, 720 F.2d 1355 (D.C. Cir. 1983). WLF has also appeared as *amicus* in *Meese v. Keene*, 107 S.Ct. 1862 (1986), dealing with enforcement of the Foreign Agents Registration Act, and *Reagan v. Abourezk*, No. 86-656, *cert. granted*, 107 S. Ct. 666 (1986) (executive discretion in the granting or denial of visa applications).

WLF has been especially active in cases involving attempts to impose judicial constraints on the federal government's capacity and authority to protect national security and participated as *amicus* before the Merit Systems Protection Board in connection with various security clearance revocation appeals, including the instant case, for which the MSPB solicited public comment on December 13, 1984. WLF appeared as *amicus* in the Walker spy cases arguing that the death penalty for espionage can be constitutionally imposed. In addition, WLF initiated a successful removal action against a Defense Department civilian employee following his conviction for second degree murder.

Amicus seeks to ensure that the proper administration of constitutional responsibilities and the execution of laws by the executive branch are not intruded upon by the judicial branch, especially in the sensitive area of national security. WLF and its membership have noted and are genuinely concerned that the security of our nation could be weakened by allowing bureaucratic or judicial review of Presidential national security personnel decisions, even when those decisions are customarily executed through executive departments pursuant to appropriately delegated authority.

STATEMENT OF THE CASE

Amicus adopts by reference the Statement as set forth in the government's brief. Nevertheless, *amicus* wishes to emphasize the following pertinent facts.

On November 29, 1981, Thomas M. Egan was hired as a Laborer Leader at the Trident Naval Refit Facility in Bremerton, Washington, on the condition that he subsequently receive a security clearance. *Egan v. Navy*, 802 F.2d 1563, 1564 (Fed. Cir. 1986). This Laborer Leader position was created to ensure quick turn-around repair, replenishment and systems checkout of the TRIDENT submarine—a vital link in America's nuclear deterrent. All positions at the facility were classified as sensitive, requiring incumbents to "qualify for and maintain eligibility for a security clearance as a condition of employment." *Id.* at 1565. The position for which respondent was hired entailed "access to classified information regarding arrival/departure of submarines and access to classified/restricted areas of equipment aboard the submarines." *Id.*

In conducting a standard security clearance review, the Navy obtained statements from the respondent evidencing a past drinking problem as well as time spent in an alcohol rehabilitation program. *Id.* at 1564. Furthermore, respondent had criminal records in California and Washington which included charges of driving with a suspended or revoked license, possession of stolen property, carrying a concealed weapon, two incidents of carrying a loaded firearm, disturbing the peace, resisting arrest, assault, battery, disorderly conduct, failure to comply with a court order, and failure to appear at a court proceeding. Respondent was convicted of several of those offenses, including the three charges which related to firearms and Second Degree Assault. *Id.* Egan served terms of imprisonment for these crimes and failed to disclose on his application for federal employment the two convictions for carrying a loaded firearm. *Id.* These facts are undisputed.

On February 16, 1983, the Department of the Navy issued a notice of intent to deny Egan's security clearance. *Id.* Mr. Egan was given an opportunity to contest the denial of his security clearance. At no time, however, did the Navy specifically invoke 5 U.S.C. § 7512 or § 7513 in effecting the security clearance denial or subsequent removal.

On May 6, 1983, Egan did avail himself of an agency procedure for contesting the Navy's notice by filing a written reply. *Id.* Significantly, Mr. Egan did *not* deny the facts of his criminal background. Through his labor union representative, Egan merely attempted to explain the omissions from his application and mitigate the information which was discovered by the National Agency Check. *Id.* Mr. Egan represented that he has paid his debt to society in full and therefore, in *his* view, was now entitled to a security clearance. *Id.*

On May 27, 1983 the Director of Naval Civilian Personnel Command issued its final determination indicating that Egan's rebuttal did not sufficiently mitigate the determinative factors and that his security clearance was therefore denied. *Id.* at 1565.

On June 17, 1983 the agency issued a notice of proposed removal "for failure to meet the requirements of your position due to denial of your security clearance." *Id.* The notice stated that his position required a security clearance and that maintenance of a security clearance was a mandatory condition of employment to ensure the security of classified defense information from hostile foreign powers." *Id.* Reassignment to a nonsensitive position was not feasible at the facility. *Id.* Mr. Egan did *not* respond orally or in writing to this notice of proposed removal.

On July 15, 1983 the agency issued its final decision of removal. *Id.* Respondent then sought review of his removal by the Merit Systems Protection Board ("MSPB" or "Board") pursuant to 5 U.S.C. § 7513(d). *Id.*

The Merit Systems Protection Board presiding officer reversed the Navy's decision based on an inability to judge whether the agency's decision was "reasonable" because the agency, in the opinion of the presiding officer, failed to establish "specific criteria" used in making the security clearance determination. *Id.* On appeal, the full Board concluded that the MSPB did not have any authority to review the agency's reasons for a security clearance determination. *Id.* at 1566. The Federal Circuit stated that the agency has a choice of removing employees for national security reasons under § 7532, in which case there would be no MSPB jurisdiction at all, or under §§ 7512, 7513 dealing with removals generally "for such cause as will promote the efficiency of the service." In a divided decision, the Court held that the Board was required to review the agency's reasons for the security clearance determination with the same full process, standards, and scope of review was for any other adverse action under § 7512, even though that section was never expressly invoked by the agency. *Id.* at 1575.

The matter now comes before this Court on the question of whether, in the course of reviewing the removal of an employee for failure to maintain a required security clearance, the Merit Systems Protection Board is authorized by statute to review the substance of the underlying reasons to deny or revoke the security clearance, or whether the scope of MSPB review is limited to determining only the fact of a security clearance denial. Indeed, since this Court can always determine *sua sponte* whether it has jurisdiction, a related question is whether the MSPB has any jurisdiction at all in reviewing a dismissal for national security reasons taken in accordance with § 7532.

SUMMARY OF ARGUMENT

Determination of security clearance qualifications is not a common employee personnel dispute subject to MSPB jurisdiction, but a somber matter of national security. When Congress enacted the Civil Service Reform Act, it did so without limiting or usurping existent executive authority over matters of national security. The decision below of the Federal Circuit grants authority to the Merit Systems Protection Board over matters of national security—over the objections of the Board itself—which resides exclusively within the authority of the executive branch. Through this bald judicial activism in an area of executive discretion, the Federal Circuit judicially assigns presidential authority to an independent and unaccountable agency.

The MSPB has neither the requisite expertise nor constitutional authority to carry out this task. In addition, the MSPB lacks any remedial authority to order the reinstatement of a national security clearance. The Civil Service Reform Act of 1978 does not alter, and in fact supports, the constitutional authority of the President over determinations directly affecting the national security. As the MSPB noted, Egan received all the procedural due process protections to which he was constitutionally entitled.

Furthermore, the MSPB did not have any jurisdiction at all over the matter because Egan's removal was based on national security reasons, and thus was taken in accordance with and under the authority of § 7532 (although not necessarily taken *expressly* pursuant to § 7532). Thus, while the agency did not cite expressly to either § 7512 or § 7532 in its notice of removal, the removal of Egan for national security reasons was authorized by § 7532, which Congress intended to be the exclusive removal authority for such reasons. Removals under the authority of § 7532 are unreviewable by MSPB and the Courts.

ARGUMENT

I. THE MERIT SYSTEMS PROTECTION BOARD LACKS STATUTORY AUTHORITY TO UNDERTAKE A COLLATERAL REVIEW OF THE SUBSTANTIVE FACTS SURROUNDING A DISCRETIONARY EXECUTIVE BRANCH DECISION WHICH RESULTS IN THE DENIAL OF A NATIONAL SECURITY CLEARANCE.

In examining the authority of the MSPB it is critically important to note that this case involves two separate and distinct governmental actions: 1) the denial of Egan's security clearance on June 15, 1983, which is, in and of itself, unreviewable by the MSPB, and 2) the subsequent employment termination which resulted from Egan's failure to meet a requirement of his position, combined with the unavailability of a non-sensitive job for reassignment. In this case the two actions happen to be in close proximity. But, as will be discussed later, the two actions could just as well have been separated by five years, for example, if Egan had been reassigned to a non-sensitive job at the time of his security clearance denial. If Egan had been terminated five years after his clearance denial, the lower court would allow Egan to collaterally attack the reasons for the denial of his clearance. *Amicus* submits, however, that the MSPB has no such authority regardless of when the actual termination took place.

A. Security Clearance Determinations Rest Entirely Within The Discretion And Exclusive Jurisdiction Of The Executive Branch.

Respondent Egan has argued below and would have this Court believe that the MSPB authority to reverse a national security clearance denial may be found in the

Civil Service Reform Act of 1978. In fact, the only authority for issuance, denial, or revocation of security clearances rests constitutionally with the Executive branch. As the dissent of Chief Judge Markey in the Federal Circuit decision on *Egan* correctly notes:

> The protection of classified information is an executive responsibility flowing from the President's constitutional mandate to provide for the national defense. U.S. Const., art. II, Sec. 2.
>
> > [I]t is the constitutional duty of the Executive —as a matter of sovereign prerogative and not as a matter of law as the courts know law—through the promulgation and enforcement of executive regulations, to protect the confidentiality necessary to carry out its responsibility in the fields of international relations and national defense. *New York Times Co. v. United States*, 403 U.S. 713, 729-30 (1971) (Stewart, J., concurring).

Egan v. Department of Navy, 802 F.2d 1563, 1580 (Fed. Cir. 1986) (Markey, C.J., dissenting).

The Fourth Circuit places unequivocal authority with the Executive branch where clandestine Central Intelligence Agency activities have been at issue:

> Gathering intelligence information and other activities of the Agency, including clandestine affairs against other nations, are all within the *President's constitutional responsibility for the security of the Nation* as the Chief Executive and as Commander in Chief of our Armed Forces. Const., art. II, Sec. 2.

United States v. Marchetti, 466 F.2d 1309 (4th Cir. 1972), *cert. denied*, 409 U.S. 1063 (1972) (emphasis added). In that same case, the Fourth Circuit favorably cites this Court's opinion in *Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp.*, 333 U.S. 103, 111 (1948):

> The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports are not and ought not to be published to the world.

466 F.2d at 1315. The President and those acting with his properly delegated authority are therefore expected to make national security decisions where others (such as the MSPB) would not and should not have access to the information upon which these determinations are based. Such national security decisions clearly include the issuance or denial of security clearances.

By Executive Order, security clearance determinations are committed to the discretion of executive agency heads charged with the protection of national security. Executive Order No. 10,450, 3 C.F.R. 936 (1953 Comp.), *reprinted as amended in* 5 U.S.C. § 7311 (1982) note. Section 6 of that order states:

> Sec. 6. Should there develop at *any stage of investigation* information indicating that the employment of any officer or employees of the government may not be *clearly consistent with the interests of national security*, the head of the department or agency concerned or his representative *shall immediately* suspend the employment of the person involved *if he deems* such suspension necessary in the interests of national security and, following such investigation and review *as he deems necessary* the head of the department or agency concerned *shall terminate* the employment of such suspended officer in the interests of national security *whenever he shall determine* such termination is necessary or advisable in accordance with the said act of August 26, 1950 (emphasis added).

This section specifically charges agency heads with the duty, responsibility, and authority to use their discretion for ensuring that employees of the government (civilian or military) remain so employed only when that employment is "clearly consistent with the interests of national security." *Id.* That discretion may also be invoked at "any stage of investigation." *Id.* Based upon § 6, it is arguable that the Navy would be derelict in its duty if it did *not* summarily discharge Mr. Egan, a recidivist convicted felon, and remove his access to Trident nuclear submarine schedules.

Section 8 of the same Executive Order 10,450 further states:

> The investigations . . . shall be designed to develop information as to whether the employment . . . of the person . . . is clearly consistent with the interests of the national security. Such information shall relate, but *shall not be limited* to the following:
>
> > (1) Depending upon the relation of the *Government employment* [*i.e.*, the position itself, not the nature of the misconduct] to the national security:
> >
> > > (i) *Any* behavior, activities, or associations which tend to show that the individual is not reliable or trustworthy.
> > >
> > > * * *
> > >
> > > (iii) *Any criminal*, infamous, dishonest, immoral, or notoriously disgraceful *conduct*, habitual use of intoxicants to excess, drug addiction or sexual perversion.
> > >
> > > * * *
> > >
> > > (v) *Any* facts which furnish reason to believe that the individual may be subject to coercion, influence, or pressure *which may cause him to act contrary* to the best interests of the national security.

Id. (emphasis added). This section specifically states the criteria by which the security clearance determinations are to be made. The court below seriously misinterpreted this section by stating that § 8 "discusses the factors to be weighed to determine whether a *person's employment* is consistent with the interests of national security." 802 F.2d at 1570 (emphasis added). In Egan's case, his

position was already classified as "sensitive." Thus, any of the items listed in subsection (iii) can be considered *per se* a disqualifying factor without the necessity of the Navy having to explain or justify whether the nature of the conduct would effect national security. In other words, any one of Egan's criminal convictions is sufficient to deny him his clearance regardless of the nexus of the conduct to national security. The only requirement for showing a "nexus" between the conduct and national security is found in subsection (v) ("facts . . . which may cause him to act contrary to the best interests of national security"). In any event, all of these matters are exclusively within the jurisdiction of the security clearance granting agency and not the MSPB.

Amicus further submits that Executive Order No. 12,356 ("National Security Information," 47 Fed. Reg. 14874, Apr. 2, 1982, as amended in 47 Fed. Reg. 15557, Apr. 8, 1982) restricts the Board from overruling the denial or revocation of security clearances by national security policy set forth in 50 U.S.C. § 401, which provides at § 4.1:

> (a) A person is eligible for access to classified information *provided that a determination of trustworthiness has been made by agency heads or designated officials* and provided that such access is essential to the accomplishment of lawful and authorized Government purposes.

Executive Orders 10,450 and 12,356 are flatly incompatible with a system wherein hearing examiners of the MSPB are allowed to override the "determinations of trustworthiness" made by the designated officials of national security executive departments and agencies with respect to safeguarding classified information. MSPB presiding officials do not constitute "agency heads" or "designated officials" who *alone* have been charged by the President with making the determination of trustworthiness which prerequisite to a security clearance. The

MSPB hearing officer erroneously decried a lack of standards or criteria used by the Navy in denying the clearance; yet the criteria are clearly specified in § 8 of Executive Order 10,450. Indeed, the Navy's own regulation closely tracks the criteria of § 8. *See* OPNAVINST 5510.1F, para. 16-102.2. When MSPB presiding officials second-guess clearance denials and purport to order the reinstatement of a revoked security clearance, they are unlawfully directing that persons who have not received that necessary determination of trustworthiness be given access to classified information.

This Court, in considering the case of a discharged government employee noted, "there is a reasonable basis for the view that an agency head who must bear the responsibility for the protection of classified information committed to his custody should have the *final say* in deciding whether to repose his trust in an employee who has access to such information." *Cole v. Young*, 351 U.S. 536, 546 (1956) (emphasis added).

The Court in *Cole* focused on the employee's actual employment *position* rather than the nexus of *his conduct* to that job or to national security and is instructive to this case. A food and drug inspector for the New York District of the Food and Drug Administration, Cole was suspended without pay pending investigation of allegations that he maintained a close association with individuals reliably reported to be Communists. 351 U.S. at 536. The Court, however, did not examine the underlying facts of the allegations (*i.e.*, the loyalty of Mr. Cole), but only addressed the question of whether his non-sensitive *position* as a meat inspector could adversely effect the national security. Egan, of course, does not contest that his position working with Trident nuclear submarines which was classified as "sensitive" could effect the national security. Nor does he contest the facts of his criminal background. Accordingly, the policy arguments by Mr. Egan—that, for example, he has paid his debt to society—are clearly not an appropriate basis for review by the MSPB or the Courts.

Thirteen years after *Cole*, the U.S. Court of Appeals for the District of Columbia Circuit spoke definitively on the subject of absolute executive branch authority governing security authorizations:

> We know of no constitutional requirement that the President must, in seeking to safeguard the integrity of classified information, provide that a security clearance must be granted unless it be affirmatively proven that the applicant "would use" it improperly. We are not in an area of knowledge or experience where absolutes obtain, and the grant or denial of security clearances is an inexact science at best, Those who have that responsibility have to do the best they can with what they have . . . Appellant is not being sent to jail; he is being told rather that, on the information developed and the facts found after hearing, [the Secretary of Defense] cannot make a finding that giving him access to secret information is "clearly consistent with the national interest."
>
> The prescription of the standard to be observed in this field is for *the President to make in the discharge of his executive functions.* We do not second-guess that choice unless the Constitution commands us to do so. The one actually chosen in this instance falls, in our view, within the range of rational choice *vested in the President* by the constitutional concept of his office.

Adams v. Laird, 420 F.2d 230, 239 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 1039 (1970) (emphasis added). *See also*, *Greene v. McElroy*, 254 F.2d 944, 949 (D.C. Cir. 1958), *rev'd on other grounds*, 360 U.S. 474 (1959).

Respondent Egan had direct access to schedules and repair procedures for part of this nation's Trident nuclear submarine fleet. 802 F.2d. at 1565. If the responsibility for ensuring secrecy regarding this element of our national defense is not vested exclusively in the executive branch, then that primary function of government mentioned above is hopelessly crippled. It is inconceivable that a statute created to manage government employer-employee relations could be interpreted to obviate the ability of government to "preserve the national existence." *Green, supra.*

In a recent matter, *Zimmerman v. Department of the Army*, 755 F.2d 156 (Fed. Cir. 1985), the court found that the MSPB does not have jurisdiction to examine military assignments and transfers.[1] *Zimmerman* placed side-by-side with *Egan*, a military assignment or transfer as compared to a security clearance determination, amounts to the proverbial distinction without a difference. Both are entirely within the executive branch zone of responsibility. As the court stated, "[J]udges are not given the task of running the Army. The responsibility for setting up channels through which such grievances can be considered and fairly settled rests upon the Congress and upon the President of the United States and his subordinates. *Id.* at 157. (Citations omitted).

Similarly, in *Buriani v. Department of the Air Force*, 777 F.2d 674 (Fed. Cir. 1985), another case where the Board declined to consider the merits of military personnel decisions resulting in an employee's loss of membership in the active reserve, the court held that where the agency relies on failure to obtain a promotion, the scope of the MSPB review is limited to the single question of whether the individual lost active reserve status for that reason. The Board, said the court, does not have any authority to examine the underlying basis for a failure to be promoted. *Id.* at 677.

Allowing the MSPB authority to second-guess the wisdom of security clearance determinations effectively transfers an executive branch responsibility—the protection of classified information—to an unaccountable body that has neither the responsibility nor the expertise to make such decisions. 802 F.2d at 1578. It may therefore be concluded that any assumption by the MSPB of substantive security clearance review violates the separation of powers doctrine by transferring a discretionary decision constitutionally vested in the executive branch to an agency not under direct authority of the President.

B. The MSPB Has No Statutory Authority To Review The Propriety Of An Agency Denial Of A National Security Clearance.

Section 1205(a)(1) of Title 5 limits the Board to hear or adjudicate only those "matters within the jurisdiction of the Board under [Title 5]." While a typical suspension or removal, or even Egan's removal, may be one "matter" reviewable under § 7512, that does not mean that the agency's reasons for the denial of a security clearance is another "matter" within the jurisdiction of the MSPB. Section 7532, as operative through § 7512 (A), specifically excludes matters of national security from MSPB jurisdiction, and no other section of the Civil Service Reform Act commands or implies review of security clearance determinations. Apart from § 7532, the Executive branch, as discussed in the previous section of our brief, has the exclusive authority to grant or deny security clearances. Accordingly, this national security decision is not a "matter" within the jurisdiction of the Board.

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[1] The court in *Zimmerman* also held that Petitioner Zimmerman's removal as a civilian technician in the Army Reserves was proper as it resulted from circumstances within her control. Since she was no longer in a reserve unit, the Army properly separated her as a civilian technician. It appears to *amicus* that the Federal Circuit has here acknowledged the distinction between an underlying cause of removal and a proximate cause of removal as discussed *infra* at page 16.

Egan, however, has claimed that § 7512, which provides for review of a *removal* as well as other specified adverse employment actions, should be interpreted as to allow the Board to examine underlying facts as they directly relate to a security clearance denial. Underlying national security issues and subjective determinations which may result in a security clearance denial are not directly relevant to the separate issue of subsequent employment termination and are therefore not within the statutorily permissible scope of MSPB review. For example, the Board refuses to review the underlying reasons which result in a bar decertification making the employee ineligible as an attorney for continued employment. *See, e.g., McGean v. National Labor Relations Board*, 15 M.S.P.B. 49, 53 (1983) (Board does not examine reasons for bar decertification where employee is removed for failure to maintain bar membership).

In Egan's case, the only facts which directly relate to his removal would be: 1) that the job for which he applied included the requirement of obtaining and maintaining a security clearance, and 2) Egan's failure to obtain a security clearance as well as the lack of any alternative non-sensitive positions. In the language of torts, it might be suggested that the Board may examine the "proximate cause" of a national security removal. The denial of a security clearance, along with a job requirement mandating the clearance, are the only two facts constituting a proximate cause of the removal. Collateral issues upon which the security determination was based are not a proximate cause of the removal and therefore, as indicated above, are not within the scope of MSPB jurisdiction.

There is also a logical inconsistency between the standard of proof for general MSPB review and the standard for security clearance approval, thus indicating that Congress never intended security clearance determinations to fall within the standard for MSPB review prescribed

at § 7701(b) and § 7701(c)(1)(B). The MSPB enabling legislation requires that the "decision of the agency shall be sustained . . . only if the agency's decision . . . is supported by a preponderance of the evidence." However, a security clearance may *only* be granted if it is "clearly consistent with the interests of the national security." Exec. Order No. 10,450, §§ 2, 7.[2] If one were to compare that MSPB "preponderance of the evidence" standard with the requirements for approval of a security clearance an obvious anomaly results. Assume that an individual was denied a security clearance due to reports of the individual being seen with or associating with KGB agents. He might then be able to successfully argue by a preponderance of the evidence—only 51 per cent—that he had mitigating evidence, such as that he did not know they were KGB agents, or that the subject of their talks were casual and not security related. The original denial of a security clearance, however, would have been based upon a much higher "clearly consistent" standard. He may pass the MSPB's 51 per cent standard while at the same time failing the agency's "clearly consistent" standard.

Faced with these inconsistent burdens of proof, and the resulting tension between them, it is inconceivable that Congress in enacting § 7701 meant to weaken the requirements for a security clearance by lowering security clearance evidentiary standards to MSPB levels. The security of this nation cannot be subject to a "preponderance of the evidence" standard in reviewing hundreds of individual security clearance denials. Well established rules of statutory construction and interpretation would indicate that statutes must be interpreted to avoid an inconsistent rule of law. *Morton v. Mancari*, 417 U.S. 535 (1974). Accordingly it must be concluded that Congress did not intend to allow substantive MSPB review of security clearance determinations.[3]

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[2] Indeed, Congress itself expressly adopted this security clearance standard in 1964 by providing that all employment at the National Security Agency must be "clearly consistent with the national security." See Pub. L. No. 88-290, 78 Stat. 168 (codified at 50 U.S.C. 831).

Not only are the evidentiary requirements for MSPB review wholly incompatible with any reasonable interpretation of the criteria for security clearance determinations, but the MSPB procedural requirements pursuant to § 7701(a), § 7701(c)(1)(B), and § 7701(c)(2) are entirely inappropriate when applied to the circumstances of any matter relating to national security. According to those sections, MSPB review of agency adverse personnel decisions under § 7701 involves a full evidentiary hearing and de novo review of both factual and legal questions. Mr. Egan, of course, has not disputed any factual allegations upon which his security clearance was denied. Therefore, he demands a substantive MSPB review of the *policy* conclusions reached by the Navy. This procedure is alien to any serious national security demands and totally ignores authority which has for 200 years remained constitutionally vested solely in the President. Under these circumstances, it would require the most extraordinary dose of judicial activism to allow a reading of the Civil Service Reform Act that would include MSPB review of executive branch security clearance determinations that lie within the discretion of the Executive branch.

This Court has agreed that discretion in areas requiring particular expertise must be left to the agency's determination. Such decisions "involve a complicated balancing of a number of factors which are peculiarly

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[3] At best, the "preponderance of the evidence" standard applicable in Egan's case would be the determinative standard for whether a security clearance was, in fact, a job requirement of Mr. Egan's position and whether Mr. Egan was denied a security clearance. As to these two claims, the Navy clearly met its burden of proof.

within [the agency's] expertise." *Heckler v. Chaney*, 470 U.S. 821, 831 (1985). The particular area of security classifications and other national security determinations has been directly addressed in *United States v. Marchetti*, 466 F.2d 1309 (4th Cir. 1972), *cert. denied*, 409 U.S. 1063 (1972). The court in *Marchetti*, in ruling on the issue of constitutional First Amendment rights versus the national security interest of enforceable security agreements and secrecy oaths, stated:

> There is a practical reason for avoiding judicial review of secrecy classifications. The significance of one item of information may frequently depend upon knowledge of many other items of information. What may seem trivial to the uninformed, may appear of great moment to one who has a broad view of the scene and may put the questioned item of information in its proper context. The courts, of course, are ill equipped to become sufficiently steeped in foreign intelligence matters to serve effectively in the review of secrecy classifications.

Id. at 1318. For the purposes of review on appeal there is no practical difference between security agreements or secrecy oaths and security clearance determinations. In neither instance does the reviewing body have the expertise alluded to in *Marchetti* to rule on the underlying merits of the executive branch determination. Following similar analysis in the case of a C.I.A. related Freedom of Information Act dispute, the court stated,

> ". . . the court is not to conduct a detailed inquiry to decide whether it agrees with the agencies opinions; to do so would violate the principle of affording substantial weight to the expert opinion of the agency. Judges, moreover, lack the expertise to second-guess such agency opinions in the typical national security FOIA case."

Halperin v. Central Intelligence Agency, 629 F.2d 144, 148 (D.C. Cir. 1980) (citations omitted).

These policy questions, according to the lower court decision, could even be heard years after the clearance denial was made. Consider the hypothetical case suggested earlier where an employee's security clearance was denied or revoked, but an alternative non-sensitive position was found. At this point there is clearly no MSPB review or jurisdiction over the security clearance denial. After five years, however, assume that the alternative job is eliminated. Under *Egan*, the terminated worker would then be able to seek MSPB review of his security clearance denial (which did not at the time result in a removal) some five years after the clearance was denied. It is by mere coincidence that Egan's security clearance denial and removal are timed together rather than years apart. Yet, an affirmation of the majority opinion in *Egan* would require the MSPB to second-guess national security policy decisions, perhaps years after the fact, which constitutionally reside within the exclusive domain of the executive branch.

C. The MSPB Lacks Statutory Authority To Remedy A Security Clearance Denial/Revocation.

Even more so than the power to review discretionary executive branch national security determinations, any authority of the MSPB to remedy an "error" cannot be assumed but must be expressly provided by statute. There are no common law remedies available to the MSPB. Indeed, the Board in reviewing *Egan* noted that it had no authority to order reinstatement of a security clearance. *Egan v. Department of the Navy*, 28 M.S.P.B. 509 (1985). Said the Board, "Ordering reinstatement of a security clearance presumes the trustworthiness of the employee to hold a security clearance . . . the Board's scope of authority does not extend to ordering the agency to reinstate an employee's security clearance." *Id.*

Therefore, respondent Egan would have this Court either declare that the MSPB—in the course of ruling on personnel problems—has the authority to choose custodians of our most sensitive national security information, or alternatively that the MSPB was given authority to review, but not change, security clearance determinations. Neither proposition satisfactorily balances the statutorily supported and constitutionally consistent opinion of the MSPB itself, as stated in the *Egan* decision, that the Board simply lacks appropriate authority over national security matters.

D. The Respondent Was Allowed And Did Exercise A Constitutionally Acceptable Standard Of Procedural Due Process.

There is no dispute that a termination of employment, even when based upon denial or revocation of a security clearance, requires an exercise of procedural due process pursuant to the Fifth and Fourteenth Amendments. *Amicus* submits that the constitutional guarantee of due process sufficiently protects the individual against whom adverse action was taken without unduly burdening the executive branch in the performance of its duties to preserve, protect, and defend that Constitution.

The MSPB in *Egan* established clear guidelines as to its authority over questions of procedural due process. The Board never attempted to avoid the issue of procedural due process. The record in *Egan* establishes that appellant was clearly given due process protections consisting of notice of the denial of the security clearance, a statement of reasons for the denial, and an opportunity to be heard. *Egan*, M.S.P.B., *supra* at 17, 18.

Neither respondent Egan, nor any other American, has the "right" to a security clearance. The security clearance sought by Egan was a condition precedent to his job retention and therefore it may be argued that

Egan had a right not to be denied a clearance without due process (i.e. "arbitrarily"). *Egan v. Department of Navy*, 802 F.2d 1563, 1580 (Fed. Cir. 1986) (Markey, C.J., dissenting). The facts not in dispute demonstrate both an absolute intent and actual effect protecting Egan's constitutional right to due process.

II. THE NAVY EFFECTIVELY EXERCISED ITS AUTHORITY TO DISMISS EGAN FOR NATIONAL SECURITY REASONS UNDER AND IN ACCORDANCE WITH SECTION 7532, THEREBY DIVESTING THE MERIT SYSTEMS PROTECTION BOARD AND THE COURTS OF ANY JURISDICTION.

Amicus submits that the lower court was mistaken in stating that § 7532 is not the exclusive section for employment termination based upon reasons of national security. 802 F.2d at 1568. While the lower court focused on the permissive "may" language of § 7532, *amicus* submits that § 7532 means that the agency is *authorized* to dismiss someone for national security reasons, but that if it wants to dismiss him for non-security reasons, *e.g.*, incompetence, it certainly can do so under § 7512. The plain meaning of Chapter 75, taken as a whole, indicates that Congress intended matters of national security be handled under separate and distinct procedural requirements from typical government employment related disputes.

The Navy exercised the authority to remove Egan as granted to it by § 7532. While not invoking § 7532 by name, the actions of the Navy were consistent and in accordance with the authority and requirements of § 7532—including both notification and an opportunity to respond before the clearance denial and before his removal. Therefore, this Court could find that the MSPB did not have subject matter jurisdiction over Mr. Egan's claim pursuant to § 7512(A) (exception to MSPB jurisdiction for "a suspension or removal under § 7532 . . ."). The Navy either has the unreviewable authority to dismiss a person on national security grounds or it does not. Neither § 7532 nor any other law requires that the Navy or any agency must *expressly* invoke their authority by U.S. Code number before they can exercise it.

Granted, the Navy notice of termination to Egan indicated a right to MSPB review (without citing § 7512), but it is *amicus'* view that the Navy erroneously informed Egan of a "right" he simply did not have. Egan received all the procedural rights specified in § 7532, except perhaps a right to an agency hearing under § 7532(c)(3)(C). But even there, the hearing must be requested, which Egan did not do, nor would he have likely done so considering his failure to even respond in writing to the agency after he received the notice of removal. It could be argued that the Navy, in failing to specifically cite § 7532 in Egan's notice, committed a harmless error. At best, Egan may be entitled to request a hearing at the agency level, but considering that there are no contested facts, the hearing would be meaningless. In any event, Egan should not now be entitled to MSPB review by putting form over substance, as the following case demonstrates.

In *Service v. Dulles*, 354 U.S. 363 (1957), Mr. Service, a Foreign Service Officer, was dismissed from the State Department because of an adverse determination concerning his loyalty. The Supreme Court affirmed the lower court's ruling in Mr. Service's favor because the State Department had failed to comply with its own internal procedural regulations governing such removals. The State Department argued, *inter alia*, however, that the *express* reason for the removal was *not* loyalty and security, but rather was a general discharge that was deemed "necessary or advisable in the interests of the United States," *id.* at 391, which would *not* have triggered the internal agency procedural mechanisms. The

Supreme Court ruled, however, that the facts and circumstances show that the real reason for the dismissal was based upon national security. Consequently, whatever procedural rights at the agency level were afforded employees in such cases must be followed.

In the instant case, there can be no doubt that Egan was similarly dismissed on security grounds, regardless of the fact that removal under § 7513(a) can be "only for such cause as will promote the efficiency of the service." This general standard is similar to the "necessary or advisable in the interests of the United States" standard referred to and disregarded by the Court in *Service v. Dulles*, *supra*. Accordingly, even if Egan were removed allegedly pursuant to § 7513(a) [although the Navy did not invoke that section], this Court should not be formalistic, but instead should rule that Egan was actually dismissed because of national security concerns. Such dismissal is certainly under the authority of and in accordance with (although not necessarily taken expressly pursuant to) § 7532(b). Accordingly, since the MSPB did not have any jurisdiction at all, neither did the Federal Circuit nor does this Court. While the parties to this litigation have not raised this point, this Court can *sua sponte* dismiss for lack of jurisdiction. *Brown Shoe Co. v. United States*, 370 U.S. 294, 305 (1962).

Putting aside the threshold jurisdictional question which arises if the facts in *Egan* represent a factual invocation of § 7532, the lower court incorrectly interpreted that section as providing an outlet for expedited termination of those who might cause *immediate* harm to the national security. 802 F.2d at 1563. Section 7532, however, was merely a codification of summary procedures which formed the basis for the decision of this Court in *Cole v. Young*, *supra*. Therein the Court stated, "In the absence of an immediate threat of harm to the 'national security,' the normal dismissal procedures seem fully adequate and the justification for summary powers disappears." 351 U.S. at 546. But it must be remembered that this statement was made in the context of the Court discussing the *position* that may effect national security. In other words, if the position was non-sensitive (*e.g.*, a food and drug inspector), then the normal procedures would be adequate. Thus, it remains the *position*, rather than the conduct, which defines the level of threat of harm to the national security. *Id.*

According to the court in *Cole*, "There is an obvious justification for the summary suspension power where the employee occupies a 'sensitive' position [such as Egan's] in which he could cause serious damage to the national security during the delay incident to an investigation and the preparation of the charges." 351 U.S. at 546.

The *position* for which Thomas Egan was hired allowed regular access to information regarding the schedules of Trident submarines. 820 F.2d at 1565. The Trident nuclear submarine fleet is a major element of the "nuclear triad" upon which rests the defense of the 245 million Americans and much of Western Europe. There can be little doubt that information available to him within the scope of his employment is of extraordinary importance to the security of our nation and would be to great value to this nation's enemies.

Specifically, it must be noted from legislative history that the Civil Service Reform Act was substantially a codification of the federal employee appeal rights existing previously by Executive Order. Absent specific language otherwise, it must be accepted that the mere codification of Executive Orders does not create rights which did not previously exist. While the legislative history of the Senate and House committees does reflect specific changes made when codifying the Executive Orders, there is no mention that executive security clearance determinations were now subject to administrative review. *See* S. Rep. 95-969, 95th Cong., 2d Sess. 46 (1978); H.R. Rep. 95-1403, 95th Cong., 2d Sess. 21-22

(1978). Since the intent of Chapter 75 was to deny MSPB substantive review of security clearance determinations and not to disturb existing Executive Orders on the subject, then it should not matter under which section the employee is discharged.

The ambiguous manner in which the government in this case exercised its authority under § 7532 does not lessen the immediate national security impact of Egan's position and security clearance denial. It does not alter the importance of quickly and efficiently separating an employee such as respondent from sources of sensitive national security related information. Accordingly, compliance with the procedural standards in § 7532 is all that is required for cases reflecting a national security employment termination.

CONCLUSION

Because Egan was terminated from his sensitive position for reasons of national security, such termination was under the authority of and in accordance with 5 U.S.C. § 7532. Therefore, neither the MSPB nor the courts have jurisdiction over the matter. If the MSPB does have jurisdiction under § 7512, then the scope of that jurisdiction does not include a review of the substantive reasons for the security clearance denial, a matter committed exclusively to the Executive branch. Accordingly, the decision below must be reversed.

Respectfully submitted,

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AMICUS CURIAE

BRIEF

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

DEPARTMENT OF THE NAVY,
Petitioner,
v.
THOMAS E. EGAN,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

The American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO"), a federation of 89 national and international unions representing approximately thirteen million working men and women, submits this brief *amicus curiae* with the consent of the parties as provided by the rules of this Court.

INTRODUCTION AND SUMMARY OF ARGUMENT

The question in this case is whether, in a Merit System Protection Board ("MSPB") proceeding under §§ 7513(a) and 7701 of the Civil Service Reform Act of 1978 ("CSRA"), the MSPB may review the merits of an employing agency's security clearance determination where that determination underlies the termination of a federal employee's employment (or other "adverse action" under § 7512) which is the subject of the case. In a thoughtful opinion based, *inter alia*, on the language, legislative history, policy and structure of the CSRA, the Court of Appeals has decided that the CSRA requires the MSPB to conduct such a review.

Petitioner's brief in this Court only barely addresses the statutory materials which, quite properly, were the basis of the Court of Appeals' decision.

Thus, the major portion of our brief addresses the effort in petitioner's brief [1] to avoid the Court of Appeals' conclusion by the assertion, on various rationales, that Congress "cannot have intended" to provide for MSPB review of security clearance determinations. (*E.g.* Pet. Br. 39.) In Part I A of our argument, we show that the claim that this case involves an area of "inherently discretionary" executive determinations is supported by none of the cited decisions of this Court. Likewise without merit is the claim (*id.* at 21): "Absent an unambiguous grant of jurisdiction by Congress, courts have traditionally been reluctant to intrude upon the authority of the executive in military and national security affairs." As we show, the cited decisions are actually confined to one aspect of internal military affairs: the relationship between the Armed Services and their own personnel. Even in this specialized area, judicial review has been afforded on the principle that "[g]enerally, judicial relief is available to one who has been injured by an act of a government official which is in excess of his express or implied powers." (*Harmon* v. *Brucker*, 355 U.S. 579, 581-82.)

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[1] The government's brief is cited as "Pet. Br."

In Part I B, we set up against petitioner's theory of what Congress "cannot have done", the fact of what Congress *has* done in a closely analogous context. In the 1974 amendments to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, Congress provided that when an agency withholds disclosure of materials on the claim that the materials are "specifically authorized under criteria established by an Executive Order to be kept secret in the inteersts of the national defense or foreign policy" (FOIA § 552(b)(1)(A)), the court is to determine whether those materials "are in fact properly classified pursuant to such Executive Order." (FOIA § 552(b)(1)(B)). No objection to this judicial review provision was raised within Congress or by the Administration.

Congress added, through 5 U.S.C. § 552(a)(4)(B), that the court's review on the classification issue would be *de novo*, and that the burden would be on the agency to sustain its determination. This amendment was strenuously opposed by the Administration and some members of the Senate who proposed that the court be required to sustain withholding of the material if there is a "reasonable basis" for the classification. These opponents advanced arguments of exclusive executive competence which parallel those made throughout petitioner's brief. These opponents' views were rejected by substantial majorities in both Houses in passing the bill and, thereafter, overriding President Ford's veto. The prevailing legislators did, however, add a caveat to the Conference Report: "the conferees expect that Federal courts, in making *de novo* determinations in section 552(b)(1) cases under the Freedom of Information law, will accord substantial weight to an agency's affidavit concerning the details of the classified status of the disputed record."

Petitioner's dogmatic contention that "Congress could not have intended to subject security clearance determinations to MSPB review" (Pet. Br. 22) cannot be maintained in the face of Congress' deliberate choice in 1974 to provide judicial review of the at least equally sensitive determination whether particular information should be protected from disclosure for national security reasons. Petitioner's further contention that the preponderance of the evidence standard of 5 U.S.C. § 7701(c)(1)(B) "is so obviously inappropriate for review of the merits of security clearance determinations that Congress cannot have intended to require review under that section" (Pet. Br. 34) is completely refuted by Congress' deliberate decision to impose on the government the burden of proving that that classification decision was correct.

In Part II A, we show that petitioner rests on a wholly unrealistic characterization of security clearance determinations and of the resulting review proceedings. Ordinarily, these are not "highly discretionary and judgmental" determinations; nor is there "need for special expertise in national security risk assessments." (Pet. Br. 39.) The run-of-the-mill case involves a simple question of fact concerning whether the employee has engaged in certain misconduct; the MSPB and arbitrators make identical decisions in countless appeals under the CSRA where such allegations result in the dismissal of employees who require *no* security clearance. Information or expertise unique to the employing agency will also rarely be required in reviewing an employee's claim that the agency failed to follow the eligibility criteria established in its regulations or that the regulations lack a "rational nexus" to security needs. Where such information is relevant, the agency can present the information to the reviewing tribunal which should give deference to such a judgment.

Petitioner does not contend that under the decision below classified materials would necessarily be part of the record of any, let alone all, review proceedings. Rather, it is said that the very inquiry "inevitably will be painting a clear picture to hostile entities of the kinds of conduct that are of concern in security determinations . . ." (Pet. Br. 39.) This argument, *in terrorem*, is belied by the fact—copiously documented in our brief—that just such information is regularly published by the Department of Defense and other government agencies.

Petitioner characterizes as the *reductio ad absurdum* of the decision below that, in reviewing a discharge grievance under 5 U.S.C. § 7121, an arbitrator could determine the merits of a security clearance revocation. In Part II B, we show, from the very arbitration proceeding which petitioner singles out as an "absurdity", what an appeal of a security clearance determination really looks like, and why such review is indispensable if the objectives of the CSRA are to be accomplished. The issues there relate at first to a single incident of marijuana possession (which was admitted) and to certain statements concerning the use of marijuana which were attributed to the employee by a government investigator (which were denied). The arbitrator, acting after a full hearing at which both sides had the opportunity to present and cross-examine witnesses and offer other evidence, concluded that the government had simply gotten its facts wrong with respect to each of the controverted issues. And with respect to the single admitted act of marijuana possession, he concluded the government had failed to follow its own guidelines (to which he properly gave deference) when the government determined that the incident justified revocation of the employee's clearance.

We make, in Part III of our argument, only three discrete points to reinforce the Court of Appeals' eminently sound conclusion from the statutory materials.

A. Petitioner assumes, because it has found no instance of such review, that the Civil Service Commission, prior to the enactment of the CSRA, never undertook to review the merits of the security clearance determination even where the denial of a clearance was the cause for an employee's removal. But in the absence of an established practice to deny such review, and of Congressional awareness of such a practice (neither of which petitioner proffers), no inference can be drawn that Congress intended to preserve the status quo for, when Congress enacts major legislation such as the CSRA, which is to provide the framework of regulating a vast subject for the foreseeable future, the legislature does not normally freeze every past practice.

B. In the course of enacting the CSRA, Congress rejected the Senate's version of the grievance and arbitration procedure, which would have barred negotiation of a grievance procedure that "includes matters involving . . . national security." Instead, it adopted what is now 5 U.S.C. § 7121(c) "which provides that grievance and arbitration procedures 'shall not apply with respect to any grievance concerning . . . (3) a suspension or removal under section 7532 of this title . . ." By eliminating the general bar to appeals in national security cases, Congress opted to allow employee appeals except where the agency has decided to proceed under § 7532.

C. Finally, we note that petitioner does not and cannot attempt to reconcile his position with the policies of the CSRA: (1) to permit the removal of protected employees only "for the efficiency of the Service" (5 U.S.C. § 7513(a)); (2) To provide for review of employee removals outside the employing agency to separate advisory and adjudicatory functions; and (3) above all, to "protect the rights of employees, recognized by the Supreme Court in *Arnett* v. *Kennedy*, 416 U.S. 134, to a full and fair consideration of their case." S.Rep. No. 969, 95th Cong. 2d Sess. 51.

ARGUMENT

I. There Is No Presumption Against Review of Security Clearance Determinations Which Affect the Employment Rights of Federal Employees.

Petitioner correctly states: "The issue in this case is one of statutory construction and 'at bottom * * * turns on congressional intent'." (Pet. Br. 22, quoting *Clarke* v. *Securities Industry Ass'n*, No. 85-971 (Jan. 14, 1987), slip op. 11.) But this indisputable truth is preceded by a lengthy dissertation in support of the proposition that "The determination whether to grant a security clearance is a sensitive and inherently discretionary determination committed by law to executive branch agencies." (Pet. Br. 15, heading.)

Even if this proposition were sound, it would not, as a matter of logic, lead to the conclusion that such a determination is "inherently" *unreviewable*, let alone that the determination may not be reviewed where, as a matter of "statutory construction", it is determined that *Congress* afforded the affected employees a right to review. (See *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579 and 635-638 (Jackson, J., concurring) ("the *Steel Seizure* case"), discussed at pp. 9-10, *infra.*) This assertion of a boundless executive power—which is evidently calculated to generate momentum for petitioner's position that a presumption of unreviewability should adhere to security clearance determinations—is, moreover, without basis in law, as we now show.[2]

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[2] This Court "would have to be that 'blind' court . . . that does not see what '[a]ll others can see and understand' not to know that there is" (*United States* v. *Rumely*, 345 U.S. 41, 44, quoting the *Child Labor Tax Case*, 259 U.S. 20, 37) a currently active dispute between the Executive and the Legislative Branches concerning the existence (and if so, the reach) of any inherent authority in the President with respect to matters of national security and foreign relations. The Court should not permit petitioner to draw it into this controversy, even by way of dictum, in litigation which concededly depends on the meaning of a statute, and in which no claim is made that the statute cannot constitutionally be construed in respondent's favor.

A. Petitioner's Claim of "Inherent" Executive Authority Is Without Merit.

None of the decisions of this Court cited at Pet. Br. 15-21 is precedent for an *inherent executive authority* which overrides Congressional enactments. *Cafeteria Workers* v. *McElroy*, 367 U.S. 886, 890, dealt with "control of access to a military base", and its ruling is that exclusion from such a base "is clearly within the constitutional powers granted to both Congress and the President." Given its context, that case brought into play Congress' several Art. I, § 8, powers to regulate the military as well as the President's "broad power" as "Commander-in-Chief of the Armed Forces"; contrary to the implication of Pet. Br. 15, *Cafeteria Workers* made no reference to some more general "executive Power of the President under Article II". Nor did the decision in *Cafeteria Workers* depend on "inherent" executive authority; in the paragraph immediately following that quoted by petitioner, the Court set forth the *statutory* authority for the Navy Department's promulgation of the regulations pursuant to which Ms. Brawner, a private individual, was excluded. (See 367 U.S. at 891.)[3]

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[3] That legislation, continuing a practice "of ancient vintage" (367 U.S. at 891), required Presidential approval of naval regulations. If the President's authority were immune from Congressional supervision, he could determine that departmental regulations would be effective without his express approval.

United States v. *Marchetti*, 466 F.2d 1309, 1315 (4th Cir.), *cert. denied*, 409 U.S. 1063, also cited at Pet. Br. 15, deals with "[g]athering intelligence information and the other activities of the [Central Intelligence] Agency, including clandestine affairs against other nations," a subject quite remote from this case. Indeed, CIA employees are expressly subject to termination at the CIA's discretion. 50 U.S.C. § 403(c). For this reason, *Doe* v. *Casey*, 796 F.2d 1508 (D.C. Cir.), *cert. granted sub nom.*, *Gates* v. *Doe*, No. 86-1294 (Pet. Br. 38-39), raises an entirely different statutory question than does this case. And, of course, the C.I.A. was created by Congress, which determines its functions and powers. See n.4, *infra.*

We agree that "[t]his Court has, on numerous occasions, recognized the *government's* 'compelling interest' in withholding national security information from unauthorized persons in the course of executive business." (Pet. Br. 15, emphasis added.) But, despite the neat injection of the phrase "executive business", this recognition has been of an executive authority subject to *paramount legislative authority* and not a recognition of an unbounded executive authority. Nor do the cases cited at Pet. Br. 15-16 fill the gap between these two entirely distinct conceptions of executive authority.

Indeed, only two of those decisions contain so much as a hint of an "inherent" executive authority concept;[4] *viz.*, *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, and *Chicago & Southern Air Lines, Inc.* v. *Waterman Steamship Corp.*, 333 U.S. 103. But when

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[4] The paragraph from *Snepp* v. *United States*, 444 U.S. 507, 509, n.3, from which petitioner quotes two words, says nothing about inherent executive authority; rather, this Court there "agree[d] with the Court of Appeals that Snepp's agreement is an 'entirely appropriate' exercise of the CIA Director's *statutory* mandate to 'protec[t] intelligence sources and methods from unauthorized disclosure,' 50 U.S.C. § 403(d)(3)." (Emphasis added.) The same point was made in *United States* v. *Marchetti*, *supra*, 466 F.2d at 1316.

United States v. *Robel*, 389 U.S. 258, 267, refers exclusively to the constitutional powers of "Congress."

United States v. *Reynolds*, 345 U.S. 1, decided a question of common law privilege (see p. 22, n.25, *infra*); the executive is mentioned only in a single sentence, from which petitioner can hardly take comfort: "Judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers." (*Id.* at 9-10.)

Totten v. *United States*, 92 U.S. 105, 106, recognized the President's authority "during the war, as commander-in-chief of the armies of the United States, to employ secret agents to enter the rebel lines and obtain information respecting the strength, resources, and movements of the enemy," and held that "contracts to compensate such agents are so far binding upon the government as to render it lawful for the President to direct payment of the amount stipulated out of the contingent fund under his control." Presumably, that "contingent fund" had been appropriated by Congress.

these same cases were put forth as precedents for inherent executive power in the *Steel Seizure* case, *supra*, Justice Jackson painstakingly demonstrated that such reliance was wholly unjustified. *Curtiss-Wright*, he explained,

> involved, not the question of the President's power to act without congressional authority, but the question of his right to act under and in accord with an Act of Congress. The constitutionality of the Act under which the President had proceeded was assailed on the ground that it delegated legislative powers to the President. [343 U.S. at 635-636, n.2.]

The portion of the *Curtiss-Wright* opinion to which petitioner here refers (299 U.S. at 320) was, as Justice Jackson made clear, "dictum" which he contrasted with the earlier case's *ratio decidendi.* (See the *Steel Seizure* case, 343 U.S. at 636, n.2, quoting *Curtiss-Wright's* holding (299 U.S. at 221-322).)[5] So, too, *Waterman Steamship* was described by Justice Jackson as an "example[] of wide definition of presidential powers under *statutory authorization*". (343 U.S. at 636, n.2 (emphasis added).)

Additionally, petitioner quotes a portion of Justice Stewart's concurrence (joined by Justice White) in *New York Times Co.* v. *United States*, 403 U.S. 713, 729-730. With all respect, we have considerable difficulty with Justice Stewart's suggestion that *any* power exists under the Constitution "as a matter of sovereign prerogative and not as a matter of law as the courts know law". And we are uncertain in any event whether Justice Stewart intended to state a rule which would guide the decisions of the courts. If he did, we submit that the better view is that of Justice Jackson in the *Steel Seizure* case:

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[5] Justice Jackson wrote:

> [*Curtiss-Wright*] recognized internal and external affairs as being in separate categories, and held that the strict limitation upon congressional delegations of power to the President over internal affairs does not apply with respect to delegations of power in external affairs. It was *intimated* that the President *might* act in external affairs without congressional authority, but not that he might act contrary to an Act of Congress. [343 U.S. at 636, emphasis added.]

> I did not suppose, and I am not persuaded, that history leaves it open to question, at least in the courts, that the executive branch, like the Federal Government as a whole, possesses only delegated powers. The purpose of the Constitution was not only to grant power, but to keep it from getting out of hand. [343 U.S. at 640.]

Indeed, the *Steel Seizure* case had decided, at the very least,[6] that even in time of war and when he asserts his authority as Commander-in-Chief, the executive is not "sovereign", and therefore may *not* contravene an Act of Congress.[7]

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[6] We so put it because the Court's opinion there can equally be read as holding that the President's seizure order would have been unauthorized and unconstitutional even if Congress had not spoken to the question. (See 343 U.S. at 587-589.)

[7] Petitioner mistakenly places repeated reliance on what is concededly a "dictum" from *Cole* v. *Young*, 351 U.S. 536, 546, and on three decisions of the District of Columbia Circuit.

The dictum from *Cole* (quoted at Pet. Br. 20 and 30) is that "there is *a reasonable basis* for the view that an agency head . . . should have the final say" in deciding who should be trusted with classified information (emphasis added). The Court did not, however, say that there is *not* a reasonable basis for the contrary view: *viz.*, that where countervailing interests are at stake, the agency head's decision should be subject to review on factual or legal grounds. Thus, the *Cole* dictum provides no support for petitioner's suggestion that Congress may not have authority to provide for review of the [illegible] of executive decision at issue here. And, of course, the *Cole* dictum does not, even by implication, diminish the force of *Cole's holding* that where Congress grants an employee a hearing, he is not to be denied it in the name of national security. It bears mention too that since the *Cole* dictum refers to determinations by the "*agency head*" (as under 5 U.S.C. § 7532 (which was at issue in *Cole*)), that case cannot, even by implication, support giving finality to the security clearance determination made

Petitioner asserts also: "Absent an unambiguous grant of jurisdiction by Congress, courts have traditionally been reluctant to intrude upon the authority of the executive in military and national security affairs." (Pet. Br. 21.) Not one of the cases cited by petitioner supports that proposition with respect to "national security affairs", or even with respect to "military affairs" generally. Each deals with some aspect of *internal* military affairs—the relationship between the Armed Services and their own personnel—and with that narrower subject alone. For example, in the most recent of these cases, the Court said:

> It is clear that the Constitution contemplated that the Legislative Branch have plenary control over rights, duties, and responsibilities in the framework of the Military Establishment, including regulations, procedures, and remedies related to military discipline; and Congress and the courts have acted in conformity with that view. [*Chappell* v. *Wallace*, 462 U.S. 296, 301.] [8]

And even with regard to the internal discipline of the military, this Court has afforded judicial review to determine whether an executive official—the Secretary of

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by a subordinate agency official, as here. See Pet. Br. 43 where this difference is claimed to make § 7532 procedures *less* desirable.

Petitioner also relies heavily on *Vitarelli* v. *Seaton*, 253 F.2d 338 (D.C. Cir.), *rev'd*, 359 U.S. 535; *Greene* v. *McElroy*, 254 F.2d 944 (D.C. Cir.), *rev'd*, 360 U.S. 474; and *Adams* v. *Laird*, 420 F.2d 230 (D.C. Cir.), *cert. denied*, 397 U.S. 1039. In none of these cases did the employee argue that some *statute* (in contrast with the Fifth Amendment) granted him a right to judicial review; thus, those decisions do not say, let alone hold, that there is anything in the Constitution which forecloses *Congress* from providing for review of security clearance determinations.

[8] Given petitioner's principal theme of inherent executive authority, the *Chappell* Court's recognition that the authority over internal military affairs was placed "in the Legislative Branch" is especially pertinent. Even the President's authority to commission military officers—the subject of *Orloff* v. *Willoughby*, 345 U.S. 83—is exercised pursuant to a delegation by Congress. (See *id.* at 90.)

the Army—had exceeded his powers. (*Harmon* v. *Brucker*, 355 U.S. 579.) That jurisdiction was asserted—not as petitioner would require, on the basis of a "clear statement of congressional intent" to authorize review (Pet. Br. 21)—but by virtue of the general grant of federal question jurisdiction under 28 U.S.C. § 1331 and the principle that: "Generally, judicial relief is available to one who has been injured by an act of a government official which is in excess of his express or implied powers." (355 U.S. at 581-82.) *Harmon*, in turn, was one of several decisions cited in *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 140, as evidencing "that judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress."[9]

B. Congress Has Not Committed the Protection of Classified Materials to the Unreviewable Discretion of the Executive Branch.

Petitioner, as we noted at the outset, would have it that executive determinations with respect to access to classified materials are inherently unreviewable, or at least presumptively so. (Compare Pet. Br. 15-20 with *id.* 20-21.) We have just shown that this position is without any foundation in this Court's cases. We now show that petitioner's position is contrary to Congressional policy as enunciated when the issue was squarely presented for legislative determination.

In 1974, Congress amended the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA"), so that the classified materials exemption from required disclosure now reads as follows:

> (b) This section does not apply to matters that are—
>
> (1)(A) specifically authorized under criteria established by an Executive order to be kept secret in

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[9] Three of the other cases cited in *Abbott Laboratories* involved an aspect of foreign relations: *Heikkila* v. *Barber*, 345 U.S. 229 (deportation); *Brownell* v. *Tom We Shung*, 352 U.S. 180 (deportation); *Rusk* v. *Cort*, 369 U.S. 367 (expatriation).

> the interest of national defense or foreign policy and (B) *are in fact properly classified pursuant to such Executive order*; . . . . [Emphasis added to show language added in 1974.][10]

At the same time, Congress adopted FOIA § 552(a)(4)(B) which provides that, in actions brought "to enjoin [an] agency from withholding agency records and to order the production of any agency records improperly withheld"—

> the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action.

FOIA §§ 552(b)(1)(B) and 552(a)(4)(B), which apply to classified materials, were Congress's response to *EPA* v. *Mink*, 410 U.S. 73, 81, which held that in deciding whether FOIA Exemption 1 is applicable, the courts are not authorized to review the correctness of the executive's security classification.[11] As the statutory language makes plain, Congress moved promptly to overturn this holding.

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[10] Pet. Br. 17, n.7, quotes 5 U.S.C. § 552(b)(1)(A) in support of the proposition that "Congress has recognized the validity of [the] executive's actions in establishing systems for classified national security information." But § 552(b)(1)(B), just quoted in the text and *omitted* in petitioner's brief, establishes that such approval does not imply a congressional judgment that determinations which the executive makes in operating such systems are to be unreviewable.

[11] The Court said there: "Obviously, this test was not the only alternative available. But Congress chose to follow the Executive's determination in these matters and that choice must be honored." 410 U.S. at 81.

It bears emphasis that, in so deciding, the Court did not invoke any presumption against judicial review, or require a "clear statement" of a congressional intent to provide review. (Cf. Pet. Br. 21.) Rather, the Court reasoned: "The language of the Act itself is sufficiently clear in this respect, but the legislative history disposes of any possible argument that Congress intended the Freedom of

Congress did so over objection from the Administration and, ultimately, only by overriding a veto by President Ford. The Senate Committee on the Judiciary reported a bill which would have overruled *Mink* to the extent of providing judicial review of the question whether the document at issue "is *in fact* specifically required by an Executive order or statute to be kept secret in the interest of national defense or foreign policy", but would have required the court to sustain the agency's determination unless, following its *in camera* examination, the court were to hold that withholding the document was "without a reasonable basis under the criteria established in that order or statute." [12]

Senator Muskie, however, offered an amendment which rejected the Committee's limited "reasonable basis" standard of judicial review in favor of *de novo* review with the burden on the agency to establish that the material in question was properly classified.[13] In opposition, Senator Hruska insisted that only the executive is competent to determine whether a document should be classified; [14] the substance of his arguments is now advanced

at Pet. Br. 15-21 herein.[15] The Muskie amendment was adopted by a vote of 56 to 29, and the Senate passed the bill, including that amendment, by 64 to 17.[16]

Over President Ford's objection (Source Book 379-380), the conferees on the FOIA amendments adopted the Senate version and, specifically, the § 552(a)(4)(B) provision for *de novo* review with the burden of persuasion on the government.[17] The conferees did include the following significant caveat in their report:

> However, the conferees recognize that the Executive departments responsible for national defense and foreign policy matters have unique insights into what adverse [e]ffects might occur as a result of public disclosure of a particular classified record. Accordingly, the conferees expect that Federal courts, in making *de novo* determinations in section 552(b)(1) cases under the Freedom of Information law, will accord substantial weight to an agency's affidavit concerning the details of the classified status of the disputed record.[18]

President Ford vetoed the bill, and reiterated his position that it is acceptable to permit judicial review, but

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Information Act to subject executive security classifications to judicial review at the insistence of anyone who might seek to question them." (410 U.S. at 82.)

[12] Staffs of Senate Committee on the Judiciary and House Committee on Government Operations, Freedom of Information Act and Amendments of 1974 (P.L. 93-502), Source Book: Legislative History, Texts, and Other Documents (Committee Print, 1975) (hereafter, "Source Book") 189 (Emphasis added.)

[13] Source Book at 302. Senator Muskie stated, "[B]y giving classified material a status unlike that of any other claimed Government secret, we foster the outworn myth that only those in possession of military and diplomatic confidence can have the expertise to decide with whom and when to share their knowledge". (Source Book at 305. See also *id.* at 323 (Senator Ervin).)

[14] Senator Hruska introduced a letter from Attorney General Saxbe which said, in immediately pertinent part:

> As the courts themselves have recognized, the conduct of defense and foreign policy is specially entrusted to the Executive by the Constitution, and this responsibility includes the protection of information necessary to the successful conduct of these activities. For this reason the constitutionality of the proposed amendment is in serious question.
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> In addition, the suggested change would call for a de novo review by the court, and shift the burden of proof to the government. Such a change would place a heavy burden on the executive branch to reveal classified material which the judicial branch is unprepared to properly evaluate. [Source Book 316.]

[15] Compare Pet. Br. 15-21 with Source Book 312-325. Compare, in particular, Pet. Br. 15-16, with Senator Hruska's reliance on *Chicago & Southern Air Lines, Inc.* v. *Waterman Steamship Corp.*, *supra*, in Source Book 314, 324-325.

[16] Source Book 328, 366.

[17] See Joint Explanatory Statement of the Committee of Conference, Source Book 225-226, 228-29.

[18] *Id.* at 229.

that the courts should "have to uphold the classification if there is a reasonable basis to support it." [19] Congress enacted the bill into law notwithstanding the veto, again by a substantial majority.[20] This legislative history was cogently summarized in *Ray* v. *Turner*, 587 F.2d 1187, 1193-1194 (D.C. Cir.):

> The legislative history underscores that the intent of Congress regarding *de novo* review stood in contrast to, and was a rejection of, the alternative suggestion proposed by the Administration and supported by some Senators: that in the national security context the court should be limited to determining whether there was a reasonable basis for the decision by the appropriate official to withhold the document. In proposing a "reasonable basis" standard, the Administration and supporting legislators argued that *de novo* responsibility and in camera inspection could not properly be assigned to judges, in part because of logistical problems, and in part because of their lack of relevant experience and meaningful appreciation of the implications of the material involved. Those who prevailed in the legislature both resisted the Administration proposal on first consideration and voted to override President Ford's veto of the bill containing the provision for *de novo* review and in camera inspection. They stressed the need for an objective, independent judicial determination, and insisted that judges could be trusted to approach the national security determinations with common sense, and without jeopardy to national security. They emphasized that in reaching a *de novo* determination the judge would accord substantial weight to detailed agency affidavits and take into account that the executive had "unique insights into what adverse [e]ffects might occur as a result of public disclosure of a particular classified record." [Footnotes omitted.]

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[19] Source Book 484.

[20] The vote in the House was 371-31 to override the veto; in the Senate, it was 65-27. (Source Book 431, 480.)

For purposes of this case, Congress' enactment of the 1974 Amendments to the FOIA teaches the following lessons:

1. Petitioner's contention that "Congress could not have intended to subject security clearance determinations to MSPB review" (Pet. Br. 22) is baseless. Congress chose in considering the analogous FOIA question—without opposition either from members of Congress or from the Administration—to provide judicial review of the factual basis of classification decisions. Such determinations are at least as sensitive—and we believe far more sensitive, see Part II-A, *infra*—than determining whether a particular individual should be afforded access to secret materials.

2. Substantial majorities of both Houses of Congress determined that such judicial review should be *de novo*, and that the burden of proof should be on the executive to support its classification. Congress' action thus wholly refutes the dogmatic assertion that the "standard for MSPB review of removals . . . is so obviously inappropriate for review of the merits of security clearance determinations that Congress cannot have intended to require review under that section." (Pet. Br. 34.) The preponderance of the evidence standard of 5 U.S.C. § 7701(c)(1)(B) which governs here is identical to the burden of proof imposed on the executive by FOIA § 552(a)(4)(B).

3. In reaching the result just described, Congress had before it and overrode arguments identical to those that petitioner presses upon this Court. (Pet. Br. 15-21 and *passim*.) Thus, Congress left no room for the argument that questions of statutory interpretation like that in this case should be decided on the basis of *a priori* notions of inherent executive power.[21]

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[21] Congress' policy is plainly entitled to far greater weight than the views of the dissenting judge below (Pet. Br. 15, 21), and the language from the Court of Appeals' decision (reversed by this Court) in *Vitarelli* v. *Seaton*, and *Greene* v. *McElroy*, quoted at Pet. Br. 20.

4. By a parity of reasoning, we do believe that the caution expressed in the 1974 FOIA Conference Report (and quoted at p. 15, *supra*) is also instructive here. Thus, in our view, in reviewing agency determinations, the MSPB should "accord substantial weight" to the employing agency's views in those instances—which we believe will be rare—where the agency's views reflect unique insights concerning national defense and foreign policy matters.

II. Review of Security Clearance Determinations in the Course of an Appeal From an Adverse Action Creates None of the Dangers Postulated by Petitioner.

A. Petitioner surrounds agency decisions to grant or withdraw a security clearance with a mystique which is wholly unjustified by the actual nature of such decisions and with appellate review thereof. In what we believe is by far the largest class, the agency's decision is based on some alleged misconduct by the employee and the issue to be decided on appeal is a mundane question of fact: was the employee guilty of that misconduct?[22] Such issues are the subjects of countless appeals under the CSRA in which allegations of some kind of misconduct have resulted in the dismissal of employees who are not required to have a security clearance, and thus are grist for the MSPB mill. It defies reason to suggest that "such decision[s] 'will often require complex political, historical, and psychological judgments'." (Pet. Br. 32, n.19, quoting *CIA* v. *Sims*, 471 U.S. 159, 176.) Nor does the decision of such cases require access to "classified information" on the part of the decisionmaker, or the introduction of such information into the evidentiary record. (Cf. Pet. Br. 32, n.19, 38-40.)

Similarly, where the agency acts on the basis of an allegation that the employee was not sufficiently careful in safeguarding classified information, there is no reason to deny review of the question whether the employee was, in fact, irresponsible and derelict in his duty, or whether, for example, he is merely a victim of a false accusation by a hostile fellow employee. (Cf. *Hoska* v. *United States Dept. of the Army*, 677 F.2d 131, 139 (D.C. Cir.).) And where the security clearance determination is "based upon . . . whether he has close relatives residing in a country that is hostile to the United States" (Pet. Br. 18), no special expertise or information is needed to decide an employee's appeal on the factual claim that he has been confused with someone else, or that the relatives are no longer alive.[23] So, too, where alleged sexual or financial misconduct is the predicate for the agency's action, the truthfulness of the charge can most assuredly be litigated without calling for a scintilla of classified information. In such cases there would appear to be an especially compelling need for impartial review distant from the accusing agency and the individual whose livelihood and reputation are at stake.

Likewise without substance is the dire prediction that "the process of MSPB review of security clearance determinations would itself threaten national security." (Pet. Br. 38, heading.) Perhaps a sufficient and conclusive answer to that assertion is that for several years, beginning with *Hoska* in 1982, the MSPB undertook such review (without the government's objection), and petitioner has made no showing that there has been any adverse result to national security. (802 F.2d at 1575.) More generally, not even petitioner asserts that classified materials will necessarily be part of the record in *any*, let alone *all*, such review proceedings, or that the MSPB could not devise procedures for protecting such information if the occasion were to arise. Rather, petitioner

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[22] Petitioner's quibble that a "clearance determination . . . is not a judgment of an individual or his past conduct", but is a "prediction [of his future behavior which] may be based upon the individual's past or present conduct" (Pet. Br. 18) does not alter the substance of the factual inquiry.

[23] By contrast, the determination that a particular country is "hostile" and might put pressure on an employee through his relatives involves foreign relations considerations and would, in our view, be entitled to considerable deference from the reviewing authority. (See p. 18, *supra*.)

makes the astounding contention that the very inquiry "inevitably will be painting a clear picture to hostile entities of the kinds of conduct that are of concern in security determinations . . ." (Pet. Br. 38.) This argument, *in terrorem*, is belied by the fact that such information *is presently published* by the Department of Defense and other governmental agencies.[24]

The fact that there is a substantial class of cases in which review can be undertaken without implicating any classified information or in which classified materials that come into evidence can be easily safeguarded is sufficient ground for rejecting petitioner's position that Congress could not have intended review of a security

clearance determination. There is, however, another class of cases which, though probably smaller, is sufficiently important to justify discussion. In such cases, the adversely affected employee contends either that the decisionmaker within the agency did not follow the criteria set forth in the agency's regulations, or that the criteria are, for some reason, invalid.

Where the employee asserts that the deciding authority within the agency failed to follow established criteria, the principle of *Service* v. *Dulles*, 354 U.S. 363, *Vitarelli* v. *Seaton*, 359 U.S. 535, and their progeny establish that judicial review is, and should be, available. The regulations which set forth the criteria most indisputably provide law for the reviewing tribunal to apply. Review is necessary, moreover, not only to preserve the rule of law, but to protect the integrity of the regulations themselves, since the low-level officials who decide individual cases do not share (and are not claimed to share) whatever specialized information may have been possessed by those who originally established the criteria.

Review is also called for on the question whether the criteria have a "rational nexus" to the withdrawal of a security clearance. The question whether a challenged eligibility criterion is valid as a predictor of employee reliability will rarely involve information or expertise which is unique to the military or to other employing agencies; rather, to the extent that special insights are required, it is those of psychologists and psychiatrists that are most relevant. That is true, for example, where the determination is based on the employee's sexual orientation or behavior. (See p. 19, *supra*.)

In those relatively rare instances in which the agency's criteria are based on specialized information, the agency is, of course, free to present that information to the reviewing tribunal, which, in our view, should give deference to the agency's judgment. Certainly, petitioner has made no showing why the Court of Appeals, in *Hoska*, was less competent to decide the "rational nexus" issue than were the individuals in the Army who promulgated the challenged criteria; characterizing that Court's decision as "blatant second-guessing" (Pet. Br. 29, n.15) is no substitute for such a showing. Petitioner "seems to ignore the ancient wisdom that calling a thing by a name does not make it so." (*Madison Sch. Dis.* v. *Wisconsin Empl. Rel. Comm'n*, 429 U.S. 167, 174.) And in the even rarer cases (if any) where such information is a military or state secret, the reviewing authority is entirely capable of devising procedures to protect such information, as Congress necessarily concluded in amending the FOIA in 1974.[25]

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[24] The criteria governing access to Sensitive Compartmented Information—the nation's most secret information, classified above Top Secret—are set forth in Directive No. 1/14 of the Director of Central Intelligence, effective April 14, 1986. Similarly, the Department of Defense has published Directive No. 5220.6, dated August 12, 1985, which spells out the standards governing issuance of a security clearance under the Defense Industrial Personnel Security Clearance Review Program ("DISCR"). Directive 5220.6 includes a section entitled "Adjudication Policy," which describes, precisely as petitioner fears (Pet. Br. 38), the criteria used to determine whether a given factor should lead to the denial or revocation of a security clearance. In addition, the Federal Personnel Manual, Chapters 731, 732 and 736, dated January 6, 1984, describes the evaluation of federal employees' suitability, their eligibility for access to sensitive information, and the means by which the Office of Personnel Management conducts personnel investigations concerning both suitability and security.

In addition to freely publishing the standards used to determine an individual's access to classified information, the government also publishes indexes to cases decided under Directive 5220.6 and the DISCR. (We are lodging copies of a recent, representative index with the Court and will serve them upon the parties.) Each index breaks down the cases according to a keyword (*e.g.*, "alcohol abuse" or "bad debts") and provides a brief synopsis. A clearer guide to "how or why certain factors compelled the revocation or denial of a security clearance" (Pet. Br. 38) simply cannot be created. Yet, readers—not excluding the "hostile entities" adverted to at Pet. Br. 38—are invited to request copies of individual cases from the Defense Legal Services Agency, located in Arlington, Virginia.

B. What the appeal of a security clearance determination really looks like is demonstrated by a case which petitioner characterizes as the "reductio ad absurdum" of the Federal Circuit's interpretation of the CSRA. (Pet. Br. 37-38.) Under 5 U.S.C. § 7121(e)(1), employees who are represented by a union are entitled to appeal from an adverse agency action either to the MSPB or to binding arbitration under their collective bargaining agreement. In contending—with the same dogmatic assurance that is displayed throughout its brief

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[25] The possibility that some cases may arise (petitioner has pointed to none during the period in which the MSPB adhered to *Hoska*) where military or state secrets would have to be revealed does not permit the conclusion that Congress intended to deny review of security clearance determinations in the vast majority of cases. Even in *Totten* v. *United States*, 92 U.S. at 107 (Pet. Br. 39), the Court said only that "public policy forbids the maintenance of any suit in a court of justice, the trial of which *would inevitably lead* to the disclosure of matters which the law itself regards as confidential, and respecting which it will not allow the confidence to be violated." (Emphasis added.) Indeed, *United States* v. *Reynolds*, also cited at Pet. Br. 39, teaches that the bar is not an absolute, and that a formal claim of privilege must be made "by the head of the department which has control over the matter." 345 U.S. at 8. In *Reynolds* the action was permitted to continue even though the claim of privilege was sustained. *Id.* at 11. See also *id.* at 11, n.26, distinguishing *Totten* on the ground that "the very subject matter of the action . . . was a matter of state secret."

—that "Congress *cannot have intended* to submit the question of whether or not to grant a security clearance to binding arbitration" (Pet. Br. 37, emphasis added), petitioner unjustifiably disparages arbitrators and the arbitration process, although Congress valued that process sufficiently to mandate arbitration in all collective bargaining agreements governed by the Federal Labor Relations Act. (See 5 U.S.C. § 7121(a)(1).)

The particular arbitration proceeding which petitioner labels an "absurdity" concerned the dismissal of employee Edwin Bonwell from his position as a Fabric Worker at the Mare Island Naval Shipyard.[26] Bonwell's position description required that he be eligible for a security clearance. In March, 1982, Bonwell attempted to enter the shipyard while in possession of marijuana, and received a ten-day suspension. In February, 1983, a government investigator, Kocher, interviewed Bonwell and prepared a written summary of the meeting. The Kocher report quoted Bonwell as stating that he had "learned his lesson" and no longer brought drugs to the shipyard. The Kocher report also stated that Bonwell had indicated that he still smoked marijuana at parties and would continue to do so; Bonwell denied that he had ever made the latter remark.

Shortly after submission of this report, the Naval Civilian Personnel Command informed Bonwell that the NCPC intended to revoke his security clearance because of his "involvement with drug abuse." Based on a review conducted *on a paper record* by Josephine Vines, a Supervisory Personnel Security Specialist, the NCPC revoked Bonwell's security clearance in June, 1983. Further appeals by Bonwell's union followed, and the Personnel Security Appeals Board issued a final denial of Bonwell's security clearance in February, 1984. Bonwell continued to work at the shipyard in the same job classification for more than two years. In April, 1986, his superintendent issued a proposal to remove Bonwell for failure to hold a security clearance. When Bonwell was dismissed over his union's objection, the grievance followed.

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[26] *In re a Controversy between Mare Island Naval Shipyard and Federal Employees Metal Trades Council, Involving the Removal of Edwin Bonwell* (May 18, 1987, Askin, Arb.). (Copies of the Arbitrator's opinion will be lodged with the Court and served on the parties.)

The arbitrator, Charles A. Askin, is a former Supervising Attorney for the NLRB and Regional Attorney for the Federal Labor Relations Authority. In the passage which petitioner finds especially objectionable, Mr. Askin correctly interpreted the Federal Circuit's opinion in this case as deciding that his jurisdiction to determine whether Bonwell's dismissal was permitted under 5 U.S.C. § 7512, entailed review of the merits of the clearance revocation. This review in turn required that the employer prove by a preponderance of the evidence that the incidents relied upon in the revocation decision occurred, and that there is a nexus between the agency's criteria set out in the regulations and the employer's ability to safeguard classified information.

The arbitrator reviewed the two incidents on which the government had grounded its security clearance revocation. The facts concerning Bonwell's March, 1982 possession of marijuana were undisputed. His alleged statements during his interview with Kocher were another matter. Unlike the Navy's security specialist, the arbitrator conducted a full hearing; each side had the opportunity to present and cross-examine witnesses and to introduce exhibits. As a result of the testimony and exhibits presented during the arbitration, the arbitrator concluded that the report had not accurately summarized Bonwell's statements:

> In view of Grievant's testimonial account of the interview there is a very plausible explanation for the discrepancy between the two accounts. Grievant acknowledged to Kocher during the interview that he smoked marijuana occasionally at parties. It appears that the investigator did not realize that Bonwell was referring to past use before the possession incident, and Kocher never clarified the matter by asking if Bonwell had smoked after that episode. Thus, Kocher may have concluded (based on his own misunderstanding) that Grievant was going to continue to smoke marijuana at parties, and the investigator noted that "summary" of his view of the interview and/or the case as a whole in the Investigation Report. [*Mare Island Arbitration Decision*, 23-24.]

The arbitrator then considered whether the possession incident had the requisite nexus with national security concerns. He began by reasoning that "the agency's own established adjudicatory guidelines for decisions about retention of individuals in sensitive positions must be accorded considerable deference." (*Id.* at 24.) He then examined the NCPC's Civilian Personnel Security Program Procedures, which list six factors to be considered in determining whether to deny or revoke a clearance because of drug abuse. Evidence presented at the hearing had established that none of these factors applied to Bonwell, and that the security specialist reviewing his case (Vines) had erred, because of her reliance on the flawed investigative report, in concluding otherwise. "In effect, she 'credited' the Kocher Report and discredited Grievant without any hearing or any independent basis of evaluating his credibility." (*Id.* at 26.)

Next, the arbitrator addressed four "mitigating factors" listed in the NCPC's guidelines. He concluded that Vines had also improperly applied these mitigating factors. One mitigating factor depended on the employee's work record and home life, and Vines had no knowledge of these factors in making her decision. Another turned on the employee's continued use of drugs, and Vines had improperly credited the investigative report on that score. Finally, Vines had apparently based her decision on the completely erroneous report that Bonwell had two drug arrests in the past two years. Accordingly, the arbitrator concluded that the removal and the underlying clearance revocation were improper.

We have set forth the *Mare Island* arbitration proceeding at some length because the proceeding exemplifies the ordinary appeal proceeding where an employee is discharged in consequence of losing his security clearance; such proceedings differ *toto coleo* from the "wholly discretionary and judgmental" proceedings conjured up by petitioner. The arbitrator was not called upon to consider any foreign relations or military matters, and no classified materials were offered in evidence. The determinations he made required no "special expertise in national security risk assessments." (Cf. Pet. Br. 39.)

In essence, the arbitrator made two rulings. First, he decided that the government had simply got its facts wrong in finding that Bonwell had stated that he would continue to use marijuana, and that Bonwell had two drug arrests. Second, he determined that the government had failed to follow its own guidelines (to which he properly gave deference) in determining that the possession incident justified revocation of Bonwell's clearance. In short, the case was no different from what it would have been if Bonwell did not need a security clearance and had been discharged on the same accusations because his employer had a (perfectly legitimate) policy against the use of drugs by employees.

The *Mare Island* case also illustrates a more fundamental point: that there is a compelling need for independent review of agency security clearance decisions which lead to an adverse employment action. The revocation of Bonwell's clearance was riddled with flaws, and was apparently the product of a hasty and poorly-considered decision—based on a paper record and not a hearing—by a government security specialist.

While petitioner repeatedly disparages review of security clearance determinations as "second-guessing" (Pet. Br. 7, n.5, 10, 13, 29, n.15, 36, n.22), it is all too clear that if either the government's security specialist or Arbitrator Askin was "guessing," it was *not* the arbitrator. A decision made after a full hearing is obviously more reliable than one in which the employee is given only the right to respond to the charges against him and to submit evidence in writing. (See Pet. Br. 3. Cf. *Greene* v. *McElroy*, 360 U.S. at 496-497.) For an employee to lose his job as a result of such flawed proceedings within the employing agency would be worse than an "absurdity"; it would be a tragedy. The Congress which, to vindicate government employees' Due Process rights—and the government's own interest in fairness—enacted an appeal procedure with a hearing before an independent tribunal at its core, "cannot have intended" such a result.

III. The Court of Appeals' Interpretation of the Civil Service Reform Act of 1978 Is Correct.

A. At Pet. Br. 27-28 it is said: "We have found no instance in which the Commission, in the course of reviewing the 'cause' for a removal, under took to review the merits of a security clearance determination, even where denial of a clearance was the cause for the removal." This, of course, does not support the affirmative claim that there is a "settled history of nonreview." (*Id.* at 39.)

There is, indeed, some circumstantial evidence—and we do not claim that it is very strong—that such review was not novel in that when the *Hoska* case was before the MSPB, the Department of the Army did not assert that the MSPB was without statutory jurisdiction to review its security clearance determination and defended only on the merits. Indeed, the jurisdictional issue was first raised in the Army's petition for rehearing in the Court of Appeals. It is reasonable to suppose that the Army—which does not lightly yield its perceived prerogatives—would have professed surprise, if security clearance determinations had previously been unreviewable.

The theory of the government's argument on this point is as weak as its evidence. The point made is that because Congress in enacting the CSRA stated that the Act made only certain specified changes in prior law the legislature was preserving the *status quo* in all other respects. But when Congress enacts major legislation such as the CSRA which is to provide the framework of regulating a vast subject—here, federal employment—for the foreseeable future, the legislature does not normally freeze every past practice no matter how little known. Perhaps, if the legislative record had shown that the Civil Service Commission had refused to allow review of security determinations, *and* that Congress was aware of such refusal, some argument of ratification by silence could be advanced on petitioner's side. But petitioner fails to show either of these propositions.[27]

B. The Court of Appeals correctly concluded that Congress enabled the agencies to remove government employees on national security grounds by proceeding under *either* 5 U.S.C. § 7512 or § 7532, and that "if sensitive information is involved in the case, the agency has available the procedures of 5 U.S.C. § 7532 and the avoidance of all non-agency review." (802 F.2d at 1568-69, 1571.)

Legislative history which appears not to have been called to that Court's attention reveals that Congress made a deliberate choice to permit review when the agency does *not* choose the §7532 option. This is shown by alternative versions of those portions of the bill which provide for grievance and arbitration proceedings under collective bargaining agreements discussed in Part II B, *supra*. The Senate bill would have barred negotiation of a grievance process that "include[d] matters involving . . . national security."[28] In place of this language, Con-

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[27] Congress did safeguard national security concerns to the extent that the legislature deemed it advisable to do so. Individual provisions exempt a variety of intelligence agencies from the definitions of prohibited personnel practices, 5 U.S.C. § 2301(a)(2)(C); from the establishment of the Senior Executive Service, § 3132(a)(1)(B); and from the requirement that agencies evaluate employee performance according to written standards, § 4301(1)(ii). But there is no such exemption for adverse employment actions based on denial of a security clearance.

[28] The broader language was included as § 7221(d) in S.2640, the version passed by the Senate on August 24, 1978. See House Subcommittee on Postal Personnel and Modernization, *Legislative*

gress adopted what is now 5 U.S.C. § 7121(c), which provides that grievance and arbitration procedures "shall not apply with respect to any grievance concerning . . . (3) a suspension or removal under section 7532 of this title . . ." By eliminating the general bar to appeals in national security cases, Congress opted to allow employee appeals except where the agency has decided to proceed under § 7532.

Petitioner, incredibly, disagrees with the Court of Appeals' conclusion "that [Egan] would have received more procedural protections under Section 7532 than he received in this case." (Pet. Br. 42.) But it is indisputable that in a § 7532 proceeding Egan would at least have been entitled to a hearing before the agency and that "he received [none] in this case." Moreover, under § 7532, removal could have been accomplished *only* by the head of the agency; that is a valuable right. (See *Kutcher* v. *Gray*, 199 F.2d 783, 787 (D.C. Cir.).)

C. 1. Petitioner makes no attempt to reconcile its position with the policies of the Civil Service Reform Act; such an effort would be doomed to fail. Congress, in that Act, required that removals of protected employees be Act, required that removals of protected employees be only "for the efficiency of the Service" (5 U.S.C. § 7513(a)) and declared it to be a prohibited personnel practice to remove (or take any other "personnel action") against an employee "on the basis of the conduct which does not adversely affect the performance of the employee . . . or the performance of others." (5 U.S.C. § 2302(b)(10)). Yet, under petitioner's theory, an employee could be removed even if there is no "rational nexus" between the criteria under which the agency withdrew his security clearance (a national security) so that

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History of the Federal Service Labor-Management Relations Statute, Title VII of the Civil Service Reform Act of 1978 at 550, 593. H.R. 11280, the bill which passed the House of Representatives on September 13, 1978, used the current language of 5 U.S.C. § 7121(c). *Id.* at 967, 979. The conferees adopted the House version without comment.

his consequent removal accomplished nothing for the efficiency of the Service.

2. A longstanding policy of the civil service system is that the employing agency should not have the final say in determining whether a protected employee may be removed. In carrying that policy forward, Congress also determined that investigative and judicial functions should not be combined in the same agency and, therefore, divided the Civil Service Commission into the OPM and MSPB. Yet, petitioner would subject employees to removal by virtue of an unreviewable determination made by an employing agency, which has both the investigated the charges against them and has decided, under some sort of procedure, to sustain those charges.

3. "[T]his Court has been willing to assume a congressional solicitude for fair procedure, absent explicit statutory language to the contrary." *Califano* v. *Yamasaki*, 442 U.S. 682, 693, citing *Greene* v. *McElroy*, 360 U.S. at 505-508. In this case, that assumption is confirmed by direct evidence from the legislative history. As the Court of Appeals said:

> The [MSPB], by refusing to review an agency's reasons for refusal of security clearance, denies to those federal employees the minimal opportunity to correct agency error, or to be protected from specious, arbitrary or discriminatory actions. The [MSPB] thus violates the congressional mandate that it "protect the rights of employees, recognized by the Supreme Court in *Arnett v. Kennedy*, 416 U.S. 134, to a full and fair consideration of their case." S.Rep. No. 969, 85th Cong., 2d Sess. 51 [802 F.2d at 1573, footnote omitted.]

When all else is said, Petitioner's position must be rejected because it would undermine the employee due process rights which Congress determined to safeguard and vindicate.

CONCLUSION

For the foregoing reasons, the judgment of the Court of appeals should be affirmed.

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AMICUS CURIAE

BRIEF

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No.86-1552

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

DEPARTMENT OF THE NAVY, PETITIONER

v.

THOMAS M. EGAN, RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR AMICUS CURIAE NATIONAL FEDERATION OF FEDERAL EMPLOYEES IN SUPPORT OF RESPONDENT

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Question Presented:

Is the Merit Systems Protection Board, in the course of reviewing the removal of an employee for failure to maintain a required security clearance, authorized by statute to review the substance of the underlying decision to deny or revoke the security clearance?

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IN THE
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BRIEF FOR AMICUS CURIAE NATIONAL FEDERATION OF FEDERAL EMPLOYEES IN SUPPORT OF RESPONDENT

INTEREST OF THE AMICUS

The National Federation of Federal Employees is the oldest and largest independent federal sector labor union and represents approximately 150,000 federal employees. Slightly more than half of that number are civilians employed by the Departments of the Army, Navy and Air Force. A sizeable percentage of those civilians are required to have some level of security clearance in order to retain their jobs. When our members face adverse actions because of the loss of their security clearances, we represent them either through a negotiated arbitration procedure or before the Merit Systems Protection Board. 1/ Consequently, amicus has a vital interest in the outcome of this case, which will decide whether the reasonableness of a decision to deny or revoke a security clear-

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1/ Federal employees represented by unions may appeal adverse actions through the negotiated grievance procedure or the MSPB procedures outlined at 5 U.S.C. §7701. The choice of forum is within the discretion of the aggrieved employee. *See* 5 U.S.C. §7121(e).

ance can be reviewed as part of an adverse action appeal.

Amicus urges this Court to find that the MSPB has the statutory obligation to examine the reasonableness of the underlying decision to deny or revoke a security clearance in an adverse action appeal, where that is the sole basis of an employee's termination. The Navy's position, which would deny the Board this role, is in the opinion of the amicus, inconsistent with the fundamental right of due process guaranteed by the fifth amendment to the Constitution. Amicus filed a brief before the MSPB in response to its solicitation of views on the scope of the Board's authority in adverse action appeals involving security clearance issues. *See* Appendix at 45a. Amicus is submitting its brief in support of Mr. Egan to assist the Court in its consideration of the issues raised by this litigation.

STATEMENT OF THE CASE

Amicus adopts the statement of the case found in Respondent Egan's brief.

There is one fact that amicus wishes to stress: the Navy took fifteen months to complete its security investigation of Mr. Egan, even though he disclosed his criminal past for the previous seven years on his employment application, Standard Form 171. Appendix at 23a. The Navy seems to suggest that it can only grant clearances to persons with spotless records, yet it hired Mr. Egan with knowledge of his criminal activities during the past seven years. If the national security interest is so critical, the unanswered question is why Mr. Egan was hired in the first place. Moreover, the Navy gives no explanation for the dilatory manner in which the investigation of Mr. Egan was conducted. The Navy's procrastination undermines the strength of its claimed interest.

SUMMARY OF ARGUMENT

Adoption of the Board's interpretation of the scope of its power in reviewing terminations based upon loss of security clearance would deny federal employees their basic due process rights.

They would be deprived of the vital rights to cross-examine adverse witnesses, to present favorable witnesses of their own, and to have an impartial body assure that the decision is reasonable. If the Board's view prevails, agencies will be encouraged to revoke security clearances as a means to circumvent the procedures that they would have to follow if adverse action procedures were followed.

The Board is well suited to review security clearance denials and revocations. The same conduct which may lead to loss or denial of a security clearance could likewise be the basis of an adverse action against a federal employee. The analysis applied to review the chosen penalty in a given disciplinary case is quite applicable to review of security clearance decisions. The Board and the Department of Defense use similar criteria in evaluating mitigating circumstances. Regulations of the Office of Personnel Management explicitly provide that if an employee is deemed unsuitable for federal employment because he presents a loyalty risk, he may appeal the determination to the Board.

The Federal Circuit correctly held that this was not a military matter exempt from review. Security clearances and loyalty in general are important concerns for both civilian and military agencies. The claimed need for secrecy is completely undermined by the Defense Department's publication in the Federal Register of a rule exhaustively describing the criteria for granting or denying a clearance.

The Navy urges that in adopting the Civil Service Reform Act, Congress did not intend to grant the Board jurisdiction to review security clearance decisions in the context of an appeal of a removal. It argues that the Civil Service Commission, the Board's predecessor, lacked such power, although it cites no administrative or judicial decision for this proposition. Amicus cites cases which affirm that the Commission had this jurisdiction.

ARGUMENT

THE MSPB MUST REVIEW THE REASONABLENESS OF THE DENIAL OF A SECURITY CLEARANCE WHEN THAT IS THE SOLE BASIS OF AN EMPLOYEE'S REMOVAL

A. Failure to Review The Reasons Supporting A Decison to Deny A Security Clearance Is Repugnant to the Principles of Due Process.

It is well established that Federal employees have a property interest in thier jobs which is protected by the due process clause of the fifth amendment to the United States Constitution. ***Arnett v. Kennedy***, 416 U.S. 134 (1974); ***Cleveland Board of Education v. Loudermill***, 470 U.S. 532 (1985). The question here is not whether due process rights apply, but rather what process is due. 2/ In the context of a termination based on the denial of a security clearance, the Merit Systems Protection Board (hereafter the Board or the MSPB) would only determine whether the position required a security clearance, whether the clearance was revoked or denied, 3/ and whether the employee was given notice of the proposed revocation or denial and an opportunity to respond. Amicus contends that such a pro forma inquiry is worse than useless, because it creates the false hope among employees that they will receive meaningful review, when in fact, the Board refuses to review the merits of the security clearance decision.

The violation of due process is twofold. First, the procedures are defective since employees are denied an opportunity to confront and cross-examine adverse witness, as well as an opportunity to present their own witnesses. Second, the employing agency is not required to establish to the satisfaction of the Board a nexus between the employee's conduct, which the agency finds objectionable, and the determination that an employee's loyalty, reliability and trustworthiness are such that granting him a security clearance is inconsistent with the interests of national security. ***See Norton v. Macy***, 417 F.2d 1161, 1167 (D.C. Cir. 1969)

2/ There seems to be little question that under ***Arnett***, a hearing which provides an opportunity to present favorable witnesses and to confront and cross-examine adverse witnesses must be afforded federal employees as the absolute minimum due process requirement. 416 U.S. at 169. Justices Powell and Blackmun, who concurred in the judgment of the Court, believed a post-termination hearing embracing these aspects of due process was adequate. Justice White, and Justice Marshall, joined by Justices Douglas and Brennan dissented, holding that this hearing must precede removal.

3/ It is irrelevant whether the underlying decision is a revocation or denial of a security clearance, as the MSPB applies the same standard in both cases. ***See Reese*** v. ***Department of Army***, 28 M.S.P.R. 502 (1985), decided the same day as *Egan*.

The Board previously recognized that the approach it adopted in *Egan* is illusory. In ***Bogdanowicz v. Department of the Army***, 16 M.S.P.R. 653 (1983), the Board concluded that to hold that security decisions were exempt from review would leave the Board with virtually nothing to review in appeals of adverse actions. "The Board would not reach the primary issue as to appellant's demotion of whether the agency has established a specific connection between the conduct which is the basis of the revocation and his ability to safeguard the materials to which his security clearance gives him access." ***Bogdanowicz, supra*** at 656.

The ***Bogdanowicz*** reasoning is consistent with ***Rolles v. Civil Service Commission***, 512 F.2d 1319 (D.C.Cir.1975), where an employee of the Air Force, who was required to maintain Air Force reserve status as a condition of civilian employment, appealed his removal from civilian employment following his loss of reserve status. The employee sought to take advantage of an exception to the rule of automatic loss of employment, available when military status is lost due to reasons outside the person's control. However, throughout the Civil Service Commission proceedings, the employee was denied an opportunity to litigate the issue of whether his loss of military status was due to reasons outside his control. The court termed this "an abominable feature...which we find totally repugnant to due process." ***Id.*** at 1321. The Court avoided the problem of encroaching upon military matters by limiting relief to reinstatement into another civilian position, finding that the military transfer was not before it. ***Id.*** at 1322, 1328.

If security clearance revocations and denials are not subject to Board review in the context of adverse action appeals, then agencies will use this procedure to circumvent Board review of otherwise appealable adverse actions. For example, under Executive Order 12564, 3 C.F.R. 224 (1987), an employee is guaranteed recourse to adverse action procedures if he is suspected of violating the regulations concerning drug abuse. However, the same employee could be denied his security clearance without an opportunity to challenge the validity of the evidence on which his loss of security clearance is based. Once his security clearance is lost he could lose his job without ever being given an opportunity to dispute the agency's findings.

Under the Board's reasoning in *Egan*, an employee who appeals his termination due to the loss of his security clearance is not permitted to cross-examine any witnesses concerning the reasons for his removal, i.e., concerning the denial or revocation of his security clearance. Moreover, the agency is not required to produce any evidence supporting the reasonableness of its decision, e.g., evidence of nexus between "an employee's specific misconduct and its actual or potentially detrimental effect on national security interests." Appendix at 64a, note 6. 4/

A common issue of fact which appears in reported cases concerns the weight given to psychiatric evaluations. Such evaluations were relied upon in *Hoska* as well as in *Doe v. Weinberger*, No. 85-5395 (D.C. Cir. June 9, 1987). In *Hoska* the Court faulted the Army for its reliance on a psychiatric evaluation, holding that the Army failed to establish nexus, to "demonstrate how, as a practical matter, the evaluation indicated that petitioner was unable to protect the classified information to which he was entrusted." 677 F.2d at 142. In *Doe*, the psychiatric report was the critical basis of the agency's conclusion that the employee's retention was inconsistent with the national security. Evidence from experts, such as psychiatrists, is commonly subject to cross-examination in courts of law. The employee must be given an opportunity to submit rebuttal expert testimony. There is no reason that employees should be denied these invaluable rights which would help prove that the employer lacks cause to remove him.

The Board avoided consideration of whether Mr. Egan was guilty of intentionally concealing facts regarding past arrests and whether the agency relied upon instances where Mr. Egan was found not guilty. 5/ The result is a denial of a meaningful hearing or

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4/ It is for the MSPB to determine whether nexus exists. Reviewing the merits as a review tribunal exercising appellate jurisdiction, the MSPB does not substitute its judgment for that of the employing agency. But it is incumbent on the employing agency to prove that its decision to deny or revoke a security clearance was reasonable and not arbitrary, especially when the nexus is not apparent. *See* Appendix at 24a.

5/ These are factual determinations, which must be proved by the employing agency by a preponderance of the evidence, under the standard proposed by amicus.

review of agency action and thus a violation of the minimum due process rights implemented by 5 U.S.C. §7512. As the Federal Circuit concluded the heavy weight of fundamental rights requires that agency action in cases such as this receive the same review by the MSPB as other adverse actions. Appendix at 25a. We agree as further discussed below.

B. Review of the Underlying Reasons For Loss of Security Clearances Is A Personnel Rather Than Military Function

1. Executive Order 10450 and Department of Defense Regulation 5200.2R Indicate That This Is A Personnel Matter.

Security clearance decisions are primarily personnel decisions rather than military decisions. The Navy regulations at issue in *Egan* 6/, as well as the Army regulations at issue in *Hoska v. Department of the Army*, 677 F.2d 131 (D.C. Cir. 1982), were both issued under the authority of Department of Defense Regulation 5200.2R (January 1987), 52 Fed. Reg. 11219 (April 8, 1987) (to be codified at 32 C.F.R. Part 154) (hereafter DoD Regulation) which was issued in part under the authority of Executive Order 10450, *reprinted* at 5 U.S.C. §7311 note. The Order establishes the requirements for security clearances for all government employees, whether in civilian or military agencies, and requires that investigations must be conducted in order to determine "whether the employment or retention in employment in the Federal service of the person being investigated is clearly consistent with the interests of the national security." E.O. 10450 §8(a). The Order enumerates a list of factors to be considered in conducting investigations. E.O. 10450 §§8(a)(1) through (8). The Order specifies that "the investigation of persons entering or employed in the competitive service shall primarily be the responsibility of the Office of Personnel Management, except in cases

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6/ *See* Brief for the Petitioner at note 2.

in which the head of a department or agency assumes that responsibility pursuant to law or by agreement with the Office." §8(b). DoD Reg. 5200.2R relies upon the same standard for determining whether a security clearance should be granted and upon the same factors cited by the Executive Order. *See* §§154.6(b), 154.7, 52 Fed. Reg 11219, 11222-11223.

The statutes cited as a basis for promulgation of Executive Order 10450 confirm that matters relating to security clearances are not inherently military in nature, but rather, are akin to personnel matters. The Order cites as the basis of the President's authority a series of statutes concerned with matters of personnel administration. The Order cites 5 U.S.C. §3301, a part of Chapter 73, which concerns Examination, Selection and Placement, which authorizes the President to prescribe rules governing admission into the civil service and concerning determinations of the fitness of applicants for duty. It also cites §7301, a part of Chapter 73, which concerns Suitability, Security and Conduct, which grants the President the power to prescribe regulations for the conduct of executive branch employees.

An examination of DoD Regulation 5200.2R suggests that security clearance decisions are by their nature reviewable by the MSPB. Review of a decision denying or revoking a clearance is akin to the Board's review of penalty determinations in ordinary adverse action cases brought under §7512. *See Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 296-303 (1981). The regulations contain detailed criteria identifying behaviors which indicate that assignment of sensitive duties is not consistent with the interests of national security. Appendix H of the Regulation further specifies disqualifying and mitigating factors to be applied in evaluating suspect behavior. 52 Fed. Reg. 11219, 11249-11254. Agency discretion is carefully circumscribed by these regulations. They provide a source of law against which to judge a decision to revoke a security clearance. These regulations are much more detailed than a typical agency table of penalties.

The regulation also adopts procedures about how decisions are made. It specifies the General Schedule level of the person entrusted with initial adjudication decisions. Depending on the nature of the clearance involved, a favorable decision may be made by a G.S. 05 civilian. An unfavorable decision must be reviewed by a G.S. 7/9, with the letter of intent to deny/revoke being signed by a G.S. 11/12. *See* §154.41(b)(2),52 Fed. Reg. 11235. " Each adjudication is to be an overall common sense determination based upon consideration and assessment of all available information." Appendix H, 52 Fed. Reg. at 11249. This is a bureaucratic process, which by its nature is amenable to review by the Merit Systems Protection Board, as well as by an appellate court.

2. Security clearance decisions are inherently reviewable, and they fall within the Board's area of expertise.

The factors considered in making security clearance adjudications are remarkably similar to those considered by the MSPB. The DoD regulation specifies that deciding whether information is relevant is one of the key objectives of the adjudicative process. §154.40(c), 52 Fed. Reg. at 11235. The regulation requires consideration of mitigating or aggravating factors including, *inter alia*, the nature and seriousness of the conduct, circumstances surrounding the conduct, voluntariness of the participation, and absence or presence of rehabilitation. These same factors are among the so called *Douglas* factors which are considered by the Board when reviewing the reasonableness of the penalty in adverse action cases. 7/

The facts at issue in security clearance cases are quite similar to the facts which must be assessed by the Board in reviewing other adverse actions. Acts of criminal or dishonest conduct; illegal or improper use, possession or sale of controlled or psychoactive substances; and acts of sexual misconduct, which may be the basis of an employee's loss of security clearance, are routine subjects on the Board's docket. 8/

7/ *Douglas*, 5 M.S.P.R. at 305-306. These factors are considered solely in deciding whether to mitigate a penalty, once the agency has sustained its case concerning the facts and has established a nexus between the misconduct and the efficiency of the service.

8/ *See e.g.*, *Harrison v. Department of Treasury*, 22 M.S.P.R. 462 (1984) (conviction on drug possession charge); *Crofoot v. U.S. Government Printing Office*, 21 M.S.P.R. 248 (conviction for false pretenses); *Doe v. National Security Agency*, 6 M.S.P.R. 555 (1981), *aff'd sub. nom. Stalans v. National Security Agency*, 678 F.2d 482 (4th Cir. 1982) (sexual misconduct).

The decision of the Presiding Official in the instant case illustrates that review of security clearance decisions fits well within the Board's area of expertise. The Official held that the agency had to show by a preponderance of evidence that the employee's acts precipitating the decision occurred. Then the agency had to persuade the Board that the final decision to revoke the security clearance was reasonable. Appendix at 63a. Similar showings are required before a removal under §7512 may be sustained by the Board. In determining reasonableness, the Presiding Official applied the Board's reasoning in *Douglas*. The Official noted that she could not substitute her judgment for that of the agency 9/, and held that the preponderance of evidence standard did not apply to the final decision itself, as it involves the exercise of the agency's judgment and discretion. 10/

Regulations which the Office of Personnel Management has promulgated confirm that loyalty is not an intrinsically military matter, nor is it a matter exempt from review. The regulations concerning suitability determinations allow OPM to force an agency to remove an employee it deems unsuitable. 5 C.F.R. §731.201. Among the bases for terming an employee unsuitable is "Reasonable doubt as to the loyalty of the

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9/ The Navy accuses the Presiding Official of having substituted her judgment for that of the Navy and likewise accuses the D.C. Circuit of having substituted its judgment for that of the Army in *Hoska*. Brief for Petitioner at 36. The mere fact that the Board disagrees with the penalty decision chosen by an agency does not mean that the Board has substituted its judgment for that of the agency. In *Douglas*, the Board explained its appellate authority:

> The Board's authority may rest as uncomfortably on the shoulders of the agencies whose actions are appealable to it as the authority of the NLRB, SEC, FTC, FCC and other independent regulatory agencies rests upon those whose actions are subject to their respective jurisdictions...
>
> The Board's...latitude of review...does not, of course, mean that the Board is free simply to substitute its judgment for that of the employing agencies. Management of the federal work force and maintenance of discipline among its members is not the Board's function. Any margin of discretion available to the Board [from appellate courts] in reviewing penalties must be exercised with appropriate deference to the primary discretion which has been entrusted to agency management, not to the Board. Our role...is principally to assure that managerial discretion has been legitimately invoked and properly exercised. *Douglas*, at 287, 300-301.

10/ The Board had upheld agency decisions removing employees for loss of security clearance prior to the reversal of its policy in *Egan*. *See Brandt v. Navy*, 22 M.S.P.R. 36 (1984).

person involved to the Government of the United States." *See* 5 C.F.R. §731.202(b)(7). OPM's decision in this regard would be appealable to the MSPB. *See* 5 C.F.R.§731.401. 11/ If such a determination made by OPM is appealable to the MSPB on its merits, there is no rational basis for concluding that judgments regarding civilians made by the military departments are any less reviewable.

C. There Is No Legal Basis For Distinguishing Between A Removal Based Upon Loss of Security Clearance and Other Removals.

In removal actions initiated under 5 U.S.C §7513(a), the MSPB is required to determine whether there is "such cause as will promote the efficiency of the service." See §7513(d). An agency must prove by a preponderance of the evidence that there is cause. *See* 5 U.S.C. §7701(c)(1)(B). The MSPB has interpreted the statute to require that an agency must prove the facts of the incident which gave rise to the discipline, that there is a nexus between the objectionable conduct and the need for discipline, and that the penalty is reasonable. *Douglas v. Veterans Administration*, 5 M.S.P.R at 302 (1981). However, in *Egan*, the Board determined that an agency need not establish any facts regarding a decision to remove an employee who has lost a security clearance, other than to show that the position required a security clearance, that the employee's clearance was either revoked or denied, and that the employee received notice and an opportunity to respond in writing. This aberration is a violation of the statutory mandate of §7701 which requires that an employee who loses his job because of the loss of a security clearance, is entitled to an impartial and conclusive hearing, at which the agency has the burden of proving that the denial or revocation of the security clearance was reasonable. The requirements established by the Board, on the other hand, impose the burden of proof upon the employee to demonstrate that he warrants a security clearance as a predicate to continued government service.

11/ *See Karpoff v. United States*, 142 Ct. Cl. 93 (1958). A finding by the Civil Service Commission that an employee was not suitable, by virtue of being a risk to national security, was reversed by the Commission's Board of Appeals and Review. The court held that failure to reinstate the employee and restore him to duties requiring a security clearance was arbitrary. The Commission investigated the employee pursuant to §8b of Executive Order 10450. The appellate functions performed by the Commission's Board of Appeals and Review are now performed by the MSPB. *See* Reorganization Plan No. 2 of 1978, *reprinted in* 1978 U.S. Code Cong. and Admin. News 9803-9804, §§202, 203.

There is no general rule that the Board does not review the underlying decision regarding a personnel action. For example, the Board reviews removals of employees who are deemed not fit for duty by virtue of some medical condition. Typically, after a finding by a federal medical officer or some other physician that the employee is not fit for duty by virtue of some ailment or medical condition, the employee is removed for failure to satisfy the medical requirements of his position. That decision is appealable to the Board. 12/ The Board recently rejected an agency's contention that the medical determination was a matter consigned to agency discretion and not reviewable under the Board's decision in *Egan*. *See Cosby v. Federal Aviation Administration*, 30 M.S.P.R. 16 (1986).

The Federal Circuit correctly distinguished the decisions in *Crofoot v. United States Government Printing Office*, 21 M.S.P.R. 248 (1984), *aff'd in part, rev'd in part, 761 F.2d 661 (Fed. Cir. 1985) (criminal convictions) and McGean v. National Labor Relations Board*, 15 M.S.P.R. 49 (1983) (bar decertification) as involving collateral attack on matters already decided by other tribunals. Appendix at 17a. The doctrine of collateral estoppel, or issue preclusion, operates so that "once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude litigation of the issue in a later suit ... involving a party to the first case." *Allen v. McCurry*, 449 U.S. 90 (1980). Persons who are criminally convicted or who lose their bar certification are entitled to full due process protection, including an opportunity to confront and cross-examine adverse witnesses and the right to a hearing before a neutral. Under the Board's reasoning in *Egan*, these crucial rights are denied employees who lose their security clearances and thereafter are terminated.

The Federal Circuit also correctly distinguished the case at bar from cases requiring deference to military decisions. Appendix at 16a. There is no statutory provision which excludes Board review of the reasons for denial or revocation of security clearances, nor is there a judicial rule that security clearance matters, as opposed to matters of military assignments, are outside the purview of either the courts or the Board. In *Harmon v. Brucker*, 355 U.S. 579 (1958) (*per curiam*), this Court held that the district court had jurisdiction to reverse the basis of a discharge, where the Army concluded that the individual's retention was not consistent with the national security. *Brucker* dealt with the status of a military member rather than a civilian employee, whose due process rights are considerably greater. In *Vitarelli v. Seaton*, 359 U.S. 535 (1959) this Court reversed the removal of an employee who was entitled to fewer due process rights than Mr. Egan, due to the nature of his appointment. The employee had been removed in the interest of national security. *Id.* at 537. 13/

In *Cole v. Young*, 351 U.S. 536 (1956), this Court refused to defer to the Secretary of Health, Education and Welfare's conclusion that a discharge was clearly consistent with the interests of national security. Apparently, the government did not claim that this was a matter exclusively consigned to agency discretion. Recently, in *Flake v. Bennett*, 611 F.Supp. 70 (D.D.C. 1985), the court held that it had jurisdiction to review an agency's determination that particular positions were critical sensitive for purposes of security investigations. On the merits, the court reversed the determinations in question.

Although the Navy suggests that consideration of information relevant to security clearances by the Board would have dire consequences, 14/ the facts do not support such a conclusion. The Navy

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12/ Cases in which the MSPB reversed an employee's removal for failure to meet fitness for duty standards include: *Smith v. Department of the Air Force*, 22 M.S.P.R. 255 (1984); *Jackson v. Defense Logistics Agency*, 11 M.S.P.R. 326 (1982); and *White v. Department of the Army*, 9 M.S.P.R. 575 (1981). Cases which affirmed the removal include: *Steve v. Department of the Air Force*, 14 M.S.P.R. 491 (1983); *Sims v. U.S. Postal Service*, 10 M.S.P.R. 607 (1983); *Risner v. Federal Aviation Administration*, 7 M.S.P.R. 480 (1981), aff'd 677 F.2d 36 (8th Cir. 1982).

13/ The court specifically criticized the inquisition into the employee's educational, social and political beliefs. *Compare*, DoD Regulation 5200.2R, which stresses the importance of establishing relevancy in making security clearance decisions. §154.40(c), 52 Fed. Reg. at 11235.

14/ Brief for the Petitioner at 16-21, 38-40.

is concerned that the integrity of the personnel security program would be compromised if an agency must explain the denial or revocation of security clearances. That the Department of Defense has promulgated a rule, published in the Federal Register and the Code of Federal Regulations, which lists in minute detail suspect behaviors, undermines the claim that the clearance program must operate under a veil of secrecy. DoD Regulation, 52 Fed. Reg. 11219 (April 8, 1987)

The government has not cited any compelling rational for setting aside the requirement that the Navy must justify all aspects of a termination decision, including the reasonableness of the denial of a security clearance. Similar determinations, initially committed to an agency's discretion, are regularly reviewed by the Board in the context of adverse actions appeals. The judicial doctrine which urges hesitation in military matters does not apply, as this case is unrelated to military status. And, despite the Navy's hyperbole about the national security implications of MSPB review, there is no evidence that Board review will affect national security, as the detailed criteria governing security clearance determinations are already a matter of public record.

D. The Civil Service Reform Act Supports The View That The MSPB Has Jurisdiction

The Navy presumes that Congress did not intend to make security clearance decisions reviewable by the Board because it claims the MSPB's predecessor body within the Civil Service Commission lacked such jurisdiction. 15/ However, the Navy cites no case in which the Commission declined jurisdiction. In *Cole v. Young*, 351 U.S. at 558, this Court held that the dismissal of the employee for national security reasons violated the Veterans Preference Act of 1944, Ch. 287, §14, 58 Stat. 390. The underlying complaint in District Court had challenged the Commission's failure to assert jurisdiction. This Court held that the Civil

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15/ The Board concluded that the legislative history of the Reform Act was silent on this point. Appendix at 48a.

Service Commission erred in refusing to take jurisdiction. 16/ By enacting the Civil Service Reform Act, which extended Veterans Preference Act protections to all competitive civil servants, this jurisdiction was transferred to the Board. Likewise, *Karpoff v. United States*, 142 Ct. Cl. 93 (1958) presumes the existence of Board review.

In enacting the Civil Service Reform Act, Pub. L. 95-454, 92 Stat. 1111 (1978) (hereafter the Reform Act), Congress took cognizance of an emerging trend toward closer judicial scrutiny of agency claims that an employee's off-duty behavior relates sufficiently to the efficiency of the service to justify firing the employee for such behavior. *Merritt v. Department of Justice*, 6 M.S.P.R. 585, 604 (1981). Congress made it clear that it approved of this trend and wished to provide it with statutory permanence. While re-enacting the "efficiency of the service" language, Congress also added more specific language prohibiting the discharge of an employee,

> on the basis of conduct which does not adversely affect the performance of the employee or applicant or the performance of others; except that nothing in this paragraph shall prohibit an agency from taking into account in determining suitability or fitness any conviction of the employee or applicant for any crime. 5 U.S.C. §2302(b)(10).17/

Representative Harris, who introduced this section, explained:

> What this amendment simply tries to do is make sure that all personnel actions are geared to activities that are job-related. It makes clear that someone cannot be punished in his or her job because of activities that are not job-related, that do not affect the performance of the person's job, that does not affect the performance of the other people working on it. It is simply saying that any sort of disciplinary or other type of action should be based

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16/ *See National Council of American Soviet Friendship v. Brownell*, 243 F.2d 222, 225 at n. 9 (D.C. Cir. 1957).

17/The concerns of this section apply to Mr. Egan's case. He disputes the agency's reliance on several of the criminal charges, either because he was not convicted or because they occurred outside the seven year period designated in the employment application. See S.F. 171, boxes 28-31. The Department of Defense regulation specifies that a mitigating circumstance is that the conduct occurred more than five years ago. Appendix H, 52 Fed. Reg. at 11250. Reliance on a past alcohol problem would be offensive to the Reform Act (§2302(b)(10)), and moreover may violate the provisions of the DoD Regulation. Appendix H, 52 Fed. Reg. at 11252.

> on job-related and non-job related conduct. House Committee on Post Office and Civil Service, Mark-Up Session on H.R. 11280, 95th Cong., 2d Sess. 39-40 (1978). [18]

A finding that the MSPB has plenary power to review the reasonableness of the Navy's denial of a security clearance in connection with an adverse action appeal is consistent with the Reform Act. The appellate entity within the Civil Service Commission had this authority, although it may seldom have been exercised, and it was transferred to the Board. Affirmance of the decision of the Federal Circuit is consistent with the provisions of the Reform Act, which intended to subject removals based on off-duty conduct to closer administrative and judicial scrutiny.

CONCLUSION

For the above reasons, the decision of the U.S. Court of Appeals for the Federal Circuit should be affirmed.

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[18] Denial of a security clearance constitutes a personnel action within the meaning of 5 U.S.C. §2302(A)(x), as it is "a significant change in duties or responsibilities which is inconsistent with the employee's salary or grade level."

AMICUS CURIAE

BRIEF

Supreme Court, U.S.
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No. 86-1552

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

DEPARTMENT OF THE NAVY,

Petitioner,

v.

THOMAS E. EGAN,

Respondent.

On a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF OF AMICUS CURIAE RALPH B. BOGDANOWICZ

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43 pp

QUESTION PRESENTED

Whether the Merit Systems Protection Board in reviewing an adverse action taken pursuant to 5 USC 7512 and 7513, whose underlying basis is the revocation of a security clearance, shall apply the same review process as with other adverse actions taken under those sections.

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BRIEF OF AMICUS CURIAE RALPH B. BOGDANOWICZ

PRELIMINARY STATEMENT

Pursuant to Supreme Court Rule 36, consent of the parties having been obtained and filed along with this brief, Ralph B. Bogdanowicz, files this brief, as amicus curiae in support of Respondent Thomas E. Egan in this action.

INTEREST OF AMICUS CURIAE

Ralph Bogdanowicz was demoted from his position as an Electronic Equipment Worker, Installer, Repairer with the Department of Army, following their rovocation of his security clearance. Mr. Bogdanowicz had appealed this demotion to the Merit Systems Protection Board (MSPB or Board). The full Board initially found that it had the authority to review the propriety of the requisite security classification in connection with its review of an appealable action based thereon. After a hearing and another petition for review by Mr. Bogdanowicz, the Board totally reversed itself, now finding that in an adverse action over which it has jurisdiction, and which is based substantially on the agency's revocation of a security clearance, it has no authority to review the agency's security clearance determination. Mr. Bogddanowicz filed a petition for review to the Federal Circuit, No. 86-510, which was stayed, following a motion by the Department of Army pending resolution of the Egan case. However, Mr. Bogdanowicz was permitted an opportunity, which he exercised, to file an amicus brief to the Federal Circuit. Mr. Bogdanowicz was the only amicus participating before the Federal Circuit and his brief was cited prominently therein.

Mr. Bogdanowicz, along with eleven other similarly situated employees to Mr. Egan, have cases pending in the Federal Circuit. (Eight of those cases were identified by the Department of Navy in its Statement of Related Cases contained in its principal brief to the Federal Circuit).

Counsel of record for Mr. Bogdanowicz is staff counsel with the American Federation of Government Employees, (AFGE) which represents approximately 700,000 civilian employees of the Federal government. AFGE and Mr. Bogdanowicz have a similar interest in assuring that property and liberty interests are protected by adequate due process. This interest also entails ensuring that the federal civilian personnel appellate scheme intended by Congress does not become eroded, while satisfying the national security interests.

SUMMARY OF ARGUMENT

The Federal Circuit below has ruled, that in an adverse action case over which the Merit Systems Protection Board (Board) has jurisdiction, and which is based substantially on an employing agency's revocation of an employee's security clearance, the Board has the authority and responsibility to review the agency's security clearance determination.

The effect of the Petitioner's position is to deny Mr. Egan, Mr. Bogdanowicz, and similarly situated employees any opportunity for a hearing to challenge the Agency's grounds for taking an adverse action against them where the Agency solely relies on the security clearance revocation. Mr. Egan and Mr. Bogdanowicz, as well as other federal employees, have a property and liberty interest in retention of their job and preservation of their good name and reputation, and failure to afford a hearing on the cause for the adverse actions violates their due process.

The statutory scheme in the Civil Service Reform Act and case precedent further confirm the propriety of the Federal Circuit's decision that Mr. Egan be afforded a hearing to challenge the underlying basis for the agency's imposition of an adverse action. Section 7513 of Title 5, U.S. Code, provides that adverse actions may be taken "only for such cause as will promote the efficiency of the service" and that an employee has a right to a hearing before the Board. Section 7701 of Title 5, U.S. Code provides that in the review by the Board, the agency's decision shall be upheld only if the agency's decision is supported by a preponderance of the evidence. Board and court precedence have consistently required that the Agency must prove every element of the charge and demonstrate the correctness of the underlying agency action. Case law has provided further that in all adverse action and security clearance revocation cases, the Agency must establish that there is some rational nexus between the adverse action taken or the revocation of the security clearance and the government's articulated reasons for the action.

Security clearance determinations have been routinely reviewed by the Board and the courts in federal employee and private contractor cases without any suggestion or spectre of grave harm to the national security.

ARGUMENT

I. MSPB Review of the Underlying Security Clearance Revocation in the Context of an Adverse Action Will Not Undermine the Security Clearance Classification System.

The first argument by Petitioner is that the administration of the classification system is committed by law to the Executive Branch, thus barring review. In support of its proposition the Petitioner refers to Executive Order 10450.

The government's analysis totally ignores significant portions of that Executive Order actually considered by the Federal Circuit below. As the Federal Circuit set forth:

> The Executive Order does not address appellate review of an agency's grant or denial of security clearance, although it discusses the factors to be weighed to determine whether a person's employment is consistent with the interests of national security. Id at Sec. 8. The Executive Order establishes responsibilities within the executive branch and is entirely consistent with the civil service laws before us. It does not purport to preclude the application of these laws. (Pet. App. p. 14a).

Moreover, as the Federal Circuit stated at footnote 4 of its decision:

> Although the dissent states that the Executive Order removed security matters from the civil service laws, by analogy to the military who (by statute) are not covered by the civil service laws, we observe that they existed in harmony from 1953 to 1958. The Executive Order instructs agency heads to establish and administer a security program; the civil service laws establish statutory procedures for removal of employees. Indeed 5 USC 7532, specific to removal of employees in the interest of national security, has its origin in a law enacted in 1950. It is a truism that the Executive can not by Order vacate an Act of Congress. (Pet. App. 14a, note 4).

That the President intended that the administration of the classification system operate within the contours of the civil service system and the Constitution is readily apparent from the text of the Executive Order itself. Section 14 of Executive Order 10450 provides that the Office of Personnel Management (OPM) shall make a continuing study of the manner in which this order is being implemented by the Government, for the purpose of determination of . . . :

> 2) tendencies in such programs to deny to individual employees fair, impartial and equitable treatment at the hands of the Government, or rights under the Constitution and laws of the United States or this Order.

There has been no references throughout the pendency of these proceedings of any continuing studies conducted by OPM; thereby engendering even greater support for the Federal Circuit's position that a fair hearing be accorded an employee.

The government in its supposition that an independent body such as the Board is ill-equiped to review these matters, speaks in general terms of reliability and loyalty. However, the government fails to elucidate that the major purpose of an appeal to the Board is to challenge the factual accuracy and validity of the underlying alleged misconduct. In Respondent's case, the Board is asked to make their typical factfinding inquiry based upon an analysis of the probative value and reliability of evidence, including witness credibility and physical and documentary evidence, in order to determine whether Mr. Egan had actually committed crimes, filed to disclose required information about the crimes, or indulged in alcohol to an excess. These are the types of factual inquiries the Board routinely makes in all adverse action cases. The Federal Circuit below recognized the elemental unfairness and due process deprivation of denying an employee any opportunity to challenge these allegations.

II. The Statutory and Constitutional Scheme Command that a Hearing be Afforded an Employee to Challenge the Security Clearance Revocation Underlying an Agency's Initiation of an Adverse Action.

The Petitioner's assertion that the "CSRA plainly does not confer general jurisdiction on the MSPB to review security clearance determinations" is patently inaccurate, and truly preposterous. In a perverse bit of syllogism the Petitioner attempts to skirt a challenge to the cause (security clearance revocation) underlying an adverse action, by suggesting that the cause itself is not an adverse action. Using a hypothetical to examine this proposition, an agency in administering any adverse action, may simply declare an employee has not met the condition of employment of being "fit for duty." The underlying basis for that determination may be the employee's instability demonstrated by the alleged striking of the supervisor. Under the agency's notion, the adverse action is the removal for being unfit for duty, not the battery. The accuracy or validity of the underlying cause for determining this unfitness i.e. striking of the supervisor, is thus not subject to challenge or review. Whether that striking actually occurred, was provoked by a racial slur, a justifiable self-defense to a first striking by the supervisor, or an inadvertent slip, are immaterial and unreviewable. The Agency assures the employee that they spoke to the supervisor, considered his response, and have determined the employee unfit for duty. Fitness for duty is a condition of employment, and no independent body can review the merits of the underlying basis for that determination of being unfit.

As the Board quite clearly originally recognized in its initial major pronouncement on this matter in *Bogdanowicz v. Dept. of Army,* MSPB Dkt. No. PH075281105877 (Sept. 27, 1983). (Amicus App. p. 1a) the adverse action is inextricably bound to the security clearance determination, and that decision may only be sustained where it will promote the efficiency of the service.

The suggestion by the Petitioner that the Federal Circuit's decision rests on a supposed presumption of MSPB review arising from the failure of the Act to preclude it expressly is absurd. As the Federal Circuit found:

> The statute provides no exclusion from Board review of removals under 5 USC Sec. 7513(a), the provision under which Mr. Egan was removed on the grounds of failure to receive a job-required security clearance. We have found no indication in the legislative history of the Civil Service Reform Act that such a removal action if taken under Sec. 7513(a) was intended to be exempt from Board review, and the government has not asserted that Congress so intended. (Pet. App. 8a).

Despite Petitioner's railings to the contrary, it is respectfully impossible to determine whether cause for removal as contemplated under 5 USC 7513(a) exists without examining the basis for the security clearance revocation or denial. Moreover, while citing a portion of Section 7513, the Petitioner fails to acknowledge this statute's entire dimension. Section 7513(a) of Title 5 also imposes a nexus requirement that permits removal only where such cause promotes the efficiency of the service.

Moreover, Section 7513 provides that the Board's review be governed by 5 USC 7701. As to the Board's decision in *Egan* that its review is limited to determining whether the agency afforded the employee "minimal due process" as defined by the Board, (Appendix p. 54a), the Federal Circuit responded:

> We have been directed to no statutory support for this new procedure. We agree that the Board is responsible for ensuring that an employee receives due process; however, the Board is also responsible for conducting, not abdicating, its other statutory responsibilities. This includes, absent contrary congressional authorization, the obligation under 5 USC 7701 to review agency actions taken under Subchapter II of Chapter 75 (Pet. App. 12a).

Section 7701 provides for a right to a hearing and a determination by the Board whether the agency's decision is supported by a preponderance of the evidence. As the Federal Circuit properly found, "Section 7701 contains no exception from such review if the decision is based upon denial of security clearance, unless of course the decision is made by the agency under Section 7532. [Federal Circuit recognized previously that the Agency consciously chose not to pursue this latter section]. (Pet. App. p. 13a).

In administering these provisions, the Board itself has consistently held that an Agency, in order to sustain its burden in supporting its decision by a preponderance of the evidence, must prove every element of the charge and demonstrate the validity of the underlying charge. As the Federal Circuit stated, even the Board acknowledged in Egan that it has the authority to review the merits of the case, including the underlying reasons upon which the adverse action is based, even in matters of agency administrative discretion (Pet. App. p. 15a). The Federal Circuit cites to *Ketterer v. U.S. Dept. of Agriculture*, 2 MSPR 294 (1980) (Board will review agency's basis for a reassignment where the employee's refusal to accept reassignment resulted in his removal); *Bavier v. Dept. of Transportation*, 4 MSPR 548 (1981) (Board held that the agency must show the propriety of its decision to deny leave to sustain its charge of absence without leave); *Huber v. MSPB*, 793 F. 2d 284 (Fed. Cir. 1986) (Board reviewed the Agency's denomination of its action as a reduction in force for jurisdictional and relief purposes). As the Federal Circuit noted, "all of these cases involved Board review of intrinsically agency — committed discretionary decisions." (Pet. App. p. 5a).

However, this Court respectfully need not go as far as scanning other Board cases where the court found it necessary to review the underlying basis for an adverse action. This court need only look at this full Board's first final order in *Bogdanowicz v. Department of Army, supra* (September 27, 1983), which held that it "has authority to review the propriety of the agency revocation of the requisite security classification in connection with its review of an appealable action based thereon since the Board may sustain the action only if it will promote the efficiency of the service." The Board in this original detrermination then used its decisions in *Bavier, supra* and *Ketterer, supra* to support the proposition that it has "consistently found that in order for an agency to sustain its burden to support its decision by a preponderance of the evidence as required by 5 U.S.C. Sec. 7701(c)(1)(B) and 5 C.F.R., Sec. 1201.56, the Agency must prove every element of the charge and demonstrate the propriety of the underlying agency decision." (Amicus App. p.3a).

The Board reasoned further in this original decision that the demotion action was indeed based directly upon the revocation of security clearance. The Board cited to *Hoska v. U.S. Department of the Army*, 677 F.2d 131 (D.C. Cir. 1982), finding that an analysis of the reasons for the revocation must be made on Board review of the subsequent adverse action since the factual basis of both actions are the same. Contrary to the suggestion of Petitioner, the D.C. Circuit in *Hoska* specifically recognized that under the applicable statutory provisions, the Army is entitled to remove a civilian employee only for such cause as will promote the efficiency of the service. 5 U.S.C. 7513. The court noted that the Petitioner conceded before the Board that given the need for the top secret clearance to perform the job, the Army's decision to terminate his employment was lawful if the revocation of his security clearance was lawful. "Conversely, if the Army unlawfully revoked his clearance, his removal from the service was also unlawful, since his removal was based entirely on his failure to retain the security clearance." *Hoska, supra*, 677 F.2d at 136. However, it is absolutely clear that the court independently recognized that pursuant to 5 U.S.C. Sec. 7513, it was the responsibility of the Board, upon appeal by an employee, to ensure that the agency sustain its burden of taking the adverse action only for such cause as will promote the efficiency of the service, and this entails reviewing the propriety of the security clearance revocation. This and similar language are excerpted from the Board's original decision in *Bogdanowicz* to find this review appropriate. It is more than simply curious how the Board made one reading of *Hoska* in 1983, and on an apparently clean slate, make a totally different reading of it in 1985 to now suit a contrary purpose.

The Board recognized further in its original September 27, 1983 order in *Bogdanowicz* that were it to agree with the agency's novel position that it is precluded from considering the propriety of the revocation action "would be to hold that it is without jurisdiction to review the action taken pursuant to 5 USC Sec. 7513(a) at all; but to simply verify the fact that appellant's security clearance was revoked." The Board in its about face position now will not reach the primary issue as to Mr. Egan's removal or whether the agency has established a "specific connection between the conduct which is the basis of the revocation and his ability to safeguard the materials to which his security clearance gives him access." This most fundamental and traditional finding, forming the very basis of the statutory requirement that the adverse action promote the efficiency of the service, has indeed been eliminated by the Board's subsequent reversal of itself.

Moreover, as the Board and courts have consistently recognized, and the D.C. Circuit in *Hoska, supra* reiterated, with respect to the adverse action based on revocation of the security clearance "it is well established that an adverse personnel action cannot withstand judicial scrutiny unless there is some rational nexus between the adverse action taken and teh government's articulated reasons for the action." *Hoska, supra*, 677 F.2d at 137; *Phillips* v. *Bergland*, 586 F.2d 1007 (4th Cir. 1978); *Merritt* v. *Department of Justice*, 6 MSPB 493 (1981); *Crofoot* v. *U.S. Government Printing Office*, 761 F.2d 661 (Fed. Cir. 1985). The court in *Hoska* cites to *Doe* v. *Hampton*, 566 F.2d 265, 272 (D.C. Cir. 1977) and a host of other adverse action cases involving, *inter alia*, allegedly immoral, disgraceful, criminal, and embarrassing conduct for the proposition that:

> In *law as well as logic*, there must be a clear and direct relationship demonstrated between the articulated grounds for an adverse personnel action and either the employee's ability to accomplish his or her duties satisfactorily or some other legitimate governmental interest promoting the "efficiency of the service." Absent a *nexus* between the "cause" asserted — here mental disability — and "promotion of the efficiency of the service," the adverse action must be condemned as arbitrary and capricious for want of a discernible basis. 677 F2d at 137.

Accord: *Bonet* v. *U.S. Postal Service*, 661 F.2d 1071 (5th Cir. 1981); *Young* v. *Hampton*, 568 F.2d 1253 (7th Cir. 1977); *Norton* v. *Macy*, 417 F.2d 1161 (D.C. Cir. 1969). Consequently, after a through analysis of the case law, the District of Columbia Circuit in *Hoska* determined in review of the security clearance revocation and the resulting dismissal that in order to deny a person access to classified defense information, there must be some evidence that the factors relied upon by the Agency bear a rational connection to the interests of national security, specifically the individual's ability to safeguard the type of information to which he has been denied access.

The Petitioner chooses to confine its discussion of *Hoska* to a footnote in its Statement of Facts [Footnote 5, page 7 of Petitioner's brief], also dismissing that decision as clear second-guessing of the security clearance determination. In its Petition for a Writ of Certiorari, at footnote 3 Petitioner postulated its reasoning for not seeking certiorari in *Hoska* five years ago as in part due to the fact that under the Federal Courts Improvement Act of 1982, future appeals from Board decisions would be to the Federal Circuit. This is not only a rather blatant attempt at belated judicial posturing, but if it was the case, represents a judgment of questionable prudence. For in the very next paragraph of footnote 3, the government acknowledges that the Board relied on *Hoska* to fully review security clearance revocations in other adverse action cases. Most disturbingly, the government does not acknowledge that in *Hoska* it never even challenged the authority of the Board to review the basis for the underlying security clearance revocation. For as the District of Columbia Circuit stated in *Hoska, "both sides agree* that the legality of [Petitioner's] dismissal depends *entirely* upon the *legality of the security clearance revocation."* (emphasis added). Thus the government's belated reasoning becomes even more curious. Moreover, contrary to its suggestion at footnote 5 of its present brief, the government is well aware of the precedential value of the *Hoska* opinion and the obvious ability of any appellant in a case arising in the District of Columbia, who also raises the issue of discrimination, to obtain a full review of the underlying security clearance revocation, as all issues would ultimately come before the District of Columbia Circuit following disposition by the District Court. *Williams v. Department of Army,* 715 F.2d 1485 (Fed. Cir. 1983).

It is not possible to seriously review a removal based entirely on a revocation of a security clearance without ascertaining the legitimacy of the facts supporting the security clearance revocation. The Federal Circuit acknowledged that the Board is properly restrained from reviewing the underlying merits of military assignments, and promotions in the cases cited by Petitioner at p. 25 and 26 of its brief, but clearly distinguished these cases. The Federal Circuit properly recognized that *Zimmerman v. Department of Army,* 755 F.2d 156 (Fed. Cir. 1985) and *Buriani v. Department of Air Force,* 777 F.2d 674 (Fed. Cir. 1985):

> turn on the long established premise that "the military constitutes a specialized community governed by a separate discipline from that of the civilian" and that it is not the role of the judiciary to intervene in the orderly execution of military affairs. *Orloff v. Willoughby,* 345 U.S. 83, 94 (1953). The civil service laws do not cover military service . . . these decisions affirming that restraint do not control Mr. Egan's situation. . . . The reasons for refraining from judicial review exemplified in *Zimmerman* and *Buriani* are not here present. (Pet. App. p. 16a).

To place the civil service program on the same footing as the military community represents a blatant snub to Congress' declared purpose and expressed intent in enacting the Civil Service Reform Act (CSRA). Unlike a system recognizing and accepting favoritism or discrimination as pervades the military, federal personnel management is to be implemented consistent with merit system principles and free from prohibited personnel practices. 5 U.S.C. 1101 note. Merit system principles include fair and equitable treatment of all employees, efficient and effective use of the work-force, and protection against arbitrary action or personal favoritism. 5 U.S.C. Sec. 2301. Prohibited personnel practices include discrimination on the basis of race, religion, sex, national origin, age, handicapping condition, martial status or political affiliation and reprisal based on exercise of lawful rights. 5 USC.Sec. 2302. The obtainment and retention of a security clearance does not and cannot remove an employee from the protections of the CSRA, and subject him to the vagaries of an internally disciplined and regimented military community. The government certainly is entitled to a consideration that a civilian employee's alleged misconduct compromises that employee's ability to safeguard information and to preserve the interests of national security, but that determination can and must be achieved by affording that employee the statutory and due process protections of a post-termination hearing satisfying the cause and nexus requirements.[1]/

The Petitioner also cites, at p. 26 of its brief, other cases where the Board refused to consider the underlying basis, i.e.

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[1]/ Moreover, the Federal Circuit, recognized "that even in the military context, in *Mindes v. Seaman,* 453 F.2d 197, 201 (5th Cir. 1971), a case heavily relied on by the Board and the agency, the court in referring to the policy of nonreview of military matters recognized that internal military affairs could be reviewed by the courts upon allegation of the deprivation of a constitutional right or that the military had acted in violation of applicable statutes and regulations, after exhaustion of available intraservice corrective measures." (Pet. App. p. 16a).

criminal convictions and bar decertifications, for agency adverse actions. *Crofoot v. U.S. Gov't Printing Office*, 21 MSPR 248 (1984) rev'd on other grounds 761 F.2d 661 (Fed. Cir. 1985); *McGean v. NLRB*, 15 MSPR 49, 53 (1983). The Federal Circuit, citing these decisions, succinctly declared:

> These decisions are distinguished on the simple ground that they relate to collateral attack on the decisions of other tribunals. The criminal conviction in *Crofoot [v. Government Printing Office*, 21 MSPR 248 (1984) rev'd on other grounds, 761 F.2d 661 (Fed. Cir. 1985)], and the bar decertification in *McGean [v. NLRB*, 15 MSPR 49 (1983)] were not federal agency actions; they were actions of entirely separate regulation or enforcement, in which the agency removing the employee had no role. A person can obtain review of the underlying facts pertinent to criminal conviction or loss of bar certification by appropriate judicial process. In Mr. Egan's case, as decided by the Board, the agency that removed him achieves a complete absence of appellate review of the underlying facts by any tribunal at all, merely by referring to the national security, whether or not that is a supportable reason for the removal (Pet. App. p. 17a).

Not only does the system designed by the Board and promulgated by the Petitioner deny any opportunity for a hearing on the security clearance revocation, it permits the same Agency that revokes the security clearance to exercise this unreviewable discretion to support its adverse action.[2]/

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[2]/ In footnote 6 of its decision in *Egan*, the Board declared "the employee of course is not precluded from pursuing any available right to judicial review of the agency's negative security clearance determination." (Pet. App. 53a). By this suggestion the Board seeks to shirk its responsibility under the statute to review the agency's basis for adverse action determinations, unduly burden the appellants and the courts, and so debilitate the process as to make it unworkable. In this situation, the Board would have an employee challenge the imposed adverse action to it while simultaneously going to court on the security clearance revocation. As the Board has a rigid time frame for resolving its cases (120 days) it

(Continued)

The suggestion by the government that prior to the CSRA of 1978, to their knowledge, there had not been a case in which a denial of a security clearance to a government employee had been reviewed on the merits, begs the question. Firstly, the CSRA formalized an adverse action appeal mechanism under a truly independent, nonmanagement oriented review body in the Board, for the very first time. More significantly, there has been a long history of full judicial review of security clearance denials/revocations of employees of defense contractors. *Gayer v. Schlesinger*, 490 F.2d 740 (D.C. Cir. 1973); *McKeand v. Laird*, 490 F.2d 1262 (9th Cir. 1973); *Marks v. Schlesinger*, 384 F. Supp. 1373 (C.D. Cal. 1974); *Smith v. Schlesinger*, 513 F.2d 462 (D.C. Cir. 1973). These cases required that there be a sufficiency of proof of a nexus between the conduct involved and the security clearance determination.

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[2]/ *continued*

would undoubtedly issue a decision before the court. The court may then conceivably reverse the Agency on the security clearance determination. The Board would then have to reopen the case, issue a decision, subject to petitions for review and ultimately the parties have the right to head back into the courts. Such a procedure is unduly burdensome, illogical, unworkable and clearly not intended by Congress. More importantly, the burden of proof in the courts shifts dramatically to the Petitioner and the standard of review is much more difficult to surmount i.e. Agency's decision is arbitrary, capricious, not in accordance in law. The fact finding process in the first instance must entail a right to a hearing before the Board to confront and cross-examine witnesses, *Greene v. McElroy*, 360 U.S. 474 (1959), putting the Agency to its task of showing the action promotes the efficiency of the service, and there is a nexus between the alleged misconduct and the ability to safeguard the type of information to which he has been denied access. The Board is entrusted with the task and possesses the expertise to conduct fact finding hearings on the grounds of misconduct or other factors underlying the security clearance revocation and the resulting adverse action and to make nexus determinations. This is traditionally the province of the Board and the court should not have to undertake this task in the first instance and cannot be placed in this role, where the security revocation involves an adverse action.

It is patently deceiving to suggest that this line of cases was based wholly on failure to follow procedures promulgated by the Defense Department. What the court in *Gayer v. Schlesinger* made clear is that:

> what is required is that every application for clearance must be considered in its particular factual setting" which must be left to a rational appraisal [of all favorable and unfavorable aspects of his life] based on relevant facts. This determination in [this case] is to be explained in such a manner that a reviewing court may be able to discern whether there is a rational connection between the facts relied upon and the conclusions drawn. Judicial acceptance of the determination and its underlying rationable calls for consideration of an individual's entitlement to the use of his skills and talents [reference to footnote 25,] the right to follow his chosen profession, *Green v. McElroy,* [360 US at 107] to the full extent compatible with a finding that such use is clearly consistent with the national security. Cf. *McKeand v. Laird, supra.*

Despite Petitioner's relegation of these cases to a footnote in its brief (footnote 15), the implications of alleged national security disclosures are no less paramount in the case of these contractor employees than that of federal employees. Government contractor employees always had hearings on these matters without any government allegation or demonstration of compromise to the national security. Acceptance of this government notion deprives federal employees of any hearing to challenge the basis for security clearance revocations and would create the entirely anomalous and unjust result that a person employed in private industry would get greater due process protections by the government, than federal employees. Congress neither intended nor could have envisioned this result. 5 CFR 155 entitles a person in private industry, denied security clearance access, to receive a statement of reasons, furnish an answer, and be entitled to a hearing become become a hearing examiner. The proceeding before the hearing examiner includes provision for discovery, presentation of evidence on one's own behalf, cross-examination of witnesses and the ability "to ascertain all relevant facts in order that a fair and impartial determination may be reached." *Gayer v. Schlesinger, supra.*[3]/

The Petitioner's suggestion that it was well established that an agency's decision to deny such a security clearance was not subject to outside substantive review is grossly misleading and inaccurate. At page 28 of its brief, the Petitioner cites a statement of dicta made in *Greene v. McElroy,* 254 F.2d at 953 that "in the case of a Government employee the courts will not inquire into the merits of a dismissal [for want of a security clearance]: they will inquire whether required procedures have been observed or an applicable statute violated, but they will not — for example — attempt to determine whether an employee is or is not a "security risk" or is "untrustworthy," citing specifically to *Vitarelli v. Seaton,* 253 F.2d at 342, 343. What the Petitioner fails to allude to here is that *Greene v. McElroy* did not involve a federal employee but an employee of a government contractor, and was specifically reversed by this Court at 360 US 474. This Court declared that without explicit authorization from either the President or Congress, the defendants were not empowered to deprive an employee of the government contractor of his position, by a proceeding in which he was not afforded the safeguards of confrontation and cross examination. Petitioners earlier suggestion at p. 20 of its brief that this reversal was based "on other grounds" is a gross distortion of the

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[3]/ Not only is the government attempting to overturn the decisions of every federal circuit that has considered the review authority of revocation/denial of security clearances of federal employees in an adverse action context, but to achieve its purpoe it now seeks to repudiate the position it itself took in *Gayer v. Schlesinger, McKeand v. Laird,* etc., where it concurred in the application of a "sufficient proof to support a rational nexus" standard. Again its support for this position is its belabored, but faulty assertion of blatant second guessing.

Constitutional magnitude of this Court's decision. This Court decried a process where Petitioner had no opportunity to confront and question persons whose statements reflected adversely on him or to confront the government investigators who took his statement. Moreover, this citation to the D.C. Circuit's opinion in *Vitarelli v. Seaton*, also remains of questionable significance in light of the subsequent reversal of that decision by this court at 359 U.S. 335 (1959). The Petitioner again asserting that this decision was reversed by this Court on other grounds, states at footnote 9 of its brief, that this Court did not contradict the court of appeals statement in that case that the merits of security clearance determinations are unreviewable. Petitioner is again way off the mark, as the government acknowledged that *Vitarelli's* position in government service at no time had been designated as sensitive. The only reason the Court proceeded with review under the concept of national security, is due to the fact that the Secretary of the Interior gratuitously decided to give this reason, notwithstanding the government's otherwise ability to summarily discharge Vitarelli as his position was not within the protection of the Civil Service, or Veteran's Preference Acts. Moreover, this Court made it clear that this employee was deprived of his right to cross-examine persons who apparently presented detrimental information regarding his "associations."

The government's citation to *Cole v. Young*, 351 US 536 (1956) (Petitioner's brief p. 29) again fails to acknowledge this Court's clear recognition that this case involved Section 7532 (and not 7513) as it concerns the immediate threat of harm to the national security. National security is defined therein as only those activities of the government directly concerned with protection of the nation from internal subversion or foreign aggression. The Petitioner at p. 30, cites dicta in *Cole v. Young*, 351 U.S. at 546 (identical dicta previously cited at p. 20 of its brief), regarding a reasonable basis for a view that an agency head should have the final say in deciding whether to repose his trust in an employee who has access to classified information. The Petitioner chooses

to again, as it did in its selective citations to the D.C. Circuit's decision in *Greene v. McElroy* and *Vitareli v. Seaton*, present an incomplete and deceptive view of this Court's holding. In language immediately following the cited provision, this Court declared:

> On the other hand, it is difficult to justify summary suspensions and unreviewable dismissals on loyalty grounds of employees who are not in "sensitive" positions and who are not situated where they could bring about any discernible adverse affects on the Nation's security. In the *absence of an immediate* threat of harm to the "national security," the *normal dismissal procedures seem fully adequate and the justification for summary powers disappears*. Indeed, in view of the stigma attached to persons dismissed on loyalty grounds, the need for procedural safeguards seems even greater than in other cases, and *we will not lightly* assume that *Congress intended to take* away *those safeguards in* the absence of some overriding necessity such as exists in the case of employees handling defense secrets, 351 U.S. 546, 547.[4]/

The Petitioner's Brief on Writ of Certiorari totally ignores the potential abuse, stigmatizing effect, and career destruction incidental to an erroneous determination of misconduct or unacceptable behavior, rendering one an alleged security risk. It totally ignores the due process implications the Federal Circuit found were inherent in the total deprivation of a pre- or post-termination hearing on the validity of the charge. (Pet. App. 20a-22a). Mr. Egan, as well as other similarly situated employees, has a property interest in continued employment with the federal government and in retention of the civil service position he maintained. *Board of Regents v. Roth*, 408 U.S. 564 (1972); *Matthews v. Eldridge*, 424 U.S. 319 (1976). Congress, as noted in *Arnett v. Kennedy*, 416 U.S. 134 (1974), in enacting the Lloyd La Follette Act (predecessor to the Civil Service Reform Act) was obviously intent on according a measure of statutory job security to governmental employees, which they had not previously enjoyed, and included therein was a guarantee against removal, enforced by a procedural mechanism designated for the determination of cause. Similarly, as the Federal Circuit recognized, Mr. Egan has a liberty interest protected by the Fifth Amendment. That liberty interest is based on charges against Mr. Egan regarding trustworthiness and ability to safeguard confidential information that might seriously damage his standing and associations in the community. Where a person's good name, reputation, honor or integrity is at stake because of what the government is doing to him, notices and opportunity to be heard are essential. *Wisconsin v. Constantineau*, 400 U.S. 433 (1971). As the Federal Circuit recognized, that liberty interest may be offended based upon an unsupported charge which could wrongfully stigmatize the reputation of an employee.

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[4]/ The routine availability of 5 U.S.C., Sec. 7532 in all security clearance cases is highly questionable, however this is not a justiciable matter in this case, as the government proceeded under 7512, and have never disputed the nonexclusivity of 7532. Moreover, this court recognized in *Cole v. Young*, *supra* that Section 7532 was designed to provide for dismissal of security risks i.e. employees having access to classified information. It must be noted that not all positions requiring security clearances have access to classified information. A further discussion of Section 7532 will follow.

The hearing in such a case is to provide the person an opportunity to clear his name. Accord: *Goss v. Lopez*, 419 U.S. 565 (1975). The Federal Circuit declared, "as discussed in *Arnett v. Kennedy*, 416 U.S. 134 (1974), federal employee due process requires a full evidentiary hearing at some point in the termination proceedings, if not before removal, then after." See also *Cleveland Board of Education v. Loudermill*, 105 S. Ct. 1487, 1469, (1985). There is no provision in the Department of Defense regulations for any type of hearing prior to or subsequent to revocation of the security clearance, nor was a hearing accorded. As the Federal Circuit below recognized, the right to a hearing is particularly cogent in the security clearance context, as final adverse personnel security actions are reported in a Defense Central

Index of Investigations, making it difficult, perhaps impossible for Mr. Egan to obtain further government employment. (Appendix p. 21a). The Federal Circuit declared:

> The Board by refusing to review an agency's reasons for refusal of security clearance denies to those federal employees the minimal opportunity to correct agency error, or to be protected from specious, arbitrary, or discriminatory actions [footnote 6 omitted]. The Board thus violated the Congressional mandate that it "protect the rights of employees, recognized by the Supreme Court in *Arnett v. Kennedy*, 416 U.S. 134 (1974), to a full and fair consideration of their case." (Pet. App. p. 22a).

Petitioner next suggests there is no law to apply to this case and the Board can not review such determinations. As set forth in great detail, the law to apply is the CSRA; 5 U.S.C. 7513, and 7701 governing appellate procedures for adverse actions.

The government argument concerning an alleged incongruity between the standard of proof governing Board appeals under 5 USC 7701(c)(1)(B) and Executive Order 10450, was never asserted by the government below or raised before the Board. In *EEOC v. FLRA*, 106 S. Ct. 1678, 1681 (1986) this Court recognized that it improvidently granted certiorari to consider issues raised by the government that were not raised below. Notwithstanding, the government's argument is simply an attempt to rewrite the civil service statute to thwart any review of its decisions, no matter how arbitrary. Moreover, there is nothing inconsistent between the Board's standards as a reviewing authority and the Executive Order. The Court below however recognized that:

> "the Board does not substitute its judgment for that of the employing agency, nor can the Board do so if the removal is based on the denial or loss of a security clearance. This point has been made in a variety of circumstances. . . . The determination that a given employee is a security risk is also committed to the sound discretion of the agency, in accordance with the

> standards set forth in its regulations. . . . The case presents no new issues of Board review, and the Board's procedures will be no different than they have been during the years the Board has exercised the authority it now seeks to abdicate. . . . To the extent Congress has authorized such review, it must continue to be implemented. (Pet. App. 25a).

The Petitioner's statement at p. 36 of its brief that the "factual allegations on which the denial of respondent's security clearance was based were not disputed" is truly incredible. The Petitioner states "they were, in any event, documented in law enforcement and judicial records." The Petitioner is reading a different record than the one available to the Federal Circuit and this court in this matter. The Federal Circuit recognized that in his reply to the charges, Mr. Egan stated he "did not list certain of the charges referred to by the agency because he had not been found guilty of the charges, because they had been dismissed, or because they had occurred outside the seven year time period designated in the employment application. The reply stated that two convictions within the last seven years were listed in his application (one of stated reasons for denial of security clearance was failure to list prior convictions on his Personnel Qualifications Statement). In addition to explaining the factual circumstances of some of the charges, the reply states that alcohol had not been a problem for Egan for more than three years (another charge concerned his past drinking habits). The reply included favorable statements from Mr. Egan's supervisors as to his background and character." (Pet. App. 3a).

Quite contrary to the Petitioner's suggestion that the presiding official of the Board substituted her judgment for that of the agency, the Federal Circuit more appropriately characterized the situation:

> Despite warnings by the presiding official concerning deficiencies in the evidence and the agency's burden of proof, the agency had elected to rely solely on the conclusory statements in its letters of proposed and final denial of clearance and on the allegations in its brief, unsubstantiated by evidence.
>
> The presiding official also held that the agency "failed to present any evidence showing it conscientiously weighed the circumstances surrounding appellant's alleged misconduct and reasonably balanced it against the interests of national security," including whether Mr. Egan actually concealed prior offenses on his SF-171, whether offenses for which mr. Egan had been arrested but subsequently found not guilty had been considered as proof of his misbehavior, and whether the statements from Mr. Egan's supervisors had been considered. (Pet. App. 5a).

As the Federal Circuit futher recognized, the basis for the agency's adverse determination as to an employee's loyalty, reliability and trustworthiness is not "unknown and unknowable" as the agency claims, but is made pursuant to specific criteria in the agency's own regulations, viz:

> h. Criminal or dishonest conduct.
>
> i. Deliberate false statement, deception or fraud in applying for enlistment or appointment or in providing information in connection with a security clearance or assignment to a sensitive position.
>
> j. Habitual or episodic use of intoxicating beverages to excess.
>
> k. Abuse of, or addition to, narcotics, drugs, or other controlled substances.
>
> * * *
>
> m. Any facts, circumstances, or conduct that indicates poor judgment, unreliability, or untrustworthiness, thereby suggesting that the person concerned might fail to safeguard classified information, deliberately or inadvertently, or may not be suitable for assignment to sensitive duties.
>
> * * *
>
> p. Refusal or intentional failure to provide material facts in a personal history statement or security form. (Pet. App. 18a).

As the Federal Circuit below recognized, there is no dearth of agency reulation, rule, or guideline for security determinations; and in Mr. Egan's case he was informed in lengthy detail of the reasons why his clearance was denied. As demonstrated in *Bogdanowicz, supra*, the Board is capable of reviewing the record to decide if the agency has established by appropriate standard that the employee should be denied a security clearance. (Pet. App. 19a). According to the scheme urged by Petitioner, there would be absolutely no independent review of an agency accusation of any of these charges, including deliberate false statement, dishonest conduct, etc, and no opportunity whatsoever for an employee to confront his accusers. An employee must be afforded an opportunity to rebut false and stigmatizing factual charges against him. Egan's, Bogdanowicz's or other employee's presentation of evidence of rehabilitation from alcohol related problems and unblemished record as to alcohol related incidents with the law, render vague specters of exposure to subversion or coercion as frivolous. Indeed Bogdanowicz was ultimately given a hearing before a presiding official, however the Board refused to review the presiding official's initial decision — after reversing its position on review. At that hearing, Bogdanowicz presented uncontradicted evidence that he had rehabilitated himself from an alcohol problem, and raised the issue of handicap discrimination.

As the D.C. Circuit stated in *Hoska, supra*, at footnote 21, "the mere allegation that Petitioner might be subject to blackmail or coercion in these circumstances is not adequate demonstration of a rational nexus." The court below declared succinctly:

> Similarly, the Board's determination of a nexus between the criteria set out in the agency's regulations and the employee's ability to safeguard classified information is not unlike other nexus determinations. The Board has upheld the removal of employees found to have falsified employment applications or to have criminal or alcoholism records, in many contexts in addition to that of national security. The statute and regulations require the Board to review adverse actions, except for those taken under 5 U.S.C., Sec. 7532, for the purpose of promoting the efficiency of the service. It is incongruous to assert, as does the dissent, that the Board is incapable of reviewing an agency's decision based on loyalty, trustworthiness or veracity, and therefore that the intent of Congress in enacting both Sec. 7512 and Sec. 7532 must be ignored.
>
> In sum, the Board is required to review the agency action taken against Mr. Egan with the same full process and standards and scope of review, established by law and precedent, as any other adverse action taken under section 7512. (Pet. App. p. 19a).

But while recognizing that the determination that a given employee is a security risk is committed to the discretion of the agency in accordance with the standards set forth in its regulations, "where a nexus is not apparent the agency's determination must not be "arbitrary and perfunctory." *Hoska*, 677 F.2d at 138 (App. p. 24a). For as the *Hoska* court recognized, the Army Regulation itself stressed that arbitrary and perfunctory decisions must be avoided. As found in *Hoska,* in order to deny a person access to classified defense information, there must be some evidence that the factors relied upon by the Army bear a rational connection to the interests of national security. Again by way of hypothetical, albeit extreme, what if an agency determined through an internal investigation that a detainment, without more, for an alleged taking of a pencil in grammar school, was sole justification for a revocation of a security clearance and consequential removal for employment. Should this be permitted to formulate the basis for this employee's loss of employment and stigmatization without an opportunity to even refute these charges at a hearing, confront his accusers, or have the agency demonstrate any rational connection between this conduct and the individual's ability to safeguard the type of information to which he has been denied access. The point is that the potential for abuse exists, arbitrary and perfunctory investigations do occur, overreaching and prejudical considerations do unfortunately cloud decisions. Absent a process to permit a hearing on these issues, the most eggregious of these improper considerations may be permitted to infest a determination affecting one's liberty and property interests.

Availability of review by an arbitrator is not, as Petitioner suggests at p. 37 of its brief, a "reductio ad absurdum" but a clearly calculated Congressional decision to make adverse action challenges available to either the Board or through a negotiated grievance procedure where available, at an employee's option. As this court has clearly held, an arbitrator is to use the same interpretation as the Board in reviewing an adverse action. *Cornelius v. Nutt*, 105 S. Ct. 2882 (1985). The availability of judicial review in all Board and arbitrator decisions involving adverse actions will ensure, as the Federal Circuit noted, that the Board or arbitrator does not substitute its judgment for that of the employing agency.

With respect to the Petitioner's argument beginning at page 38 of its brief, the process of MSPB review of security clearance determinations would not itself threaten national security. The Petitioner has not come forward or even suggested one occasion where the existing MSPB process involving numerous reviews (p. 22 of Petitioner's brief) or review by the Federal Circuit in *Egan* or the D.C. Circuit in *Hoska* threatened or harmed the national security. As the Federal Circuit in *Egan* declared:

> It is apparent that where national security considerations are involved, safeguards of sensitive information, if sensitive information is critical to the case, may be required in reviewing the Agency's decision. But overstatement infects the Board's position that "It would inevitably be faced with agency exposition of highly sensitive materials. 28 MSPR at 518. No such materials were asserted in Mr. Egan's appeal before the presiding official." (Pet. App. 17a).

The Agency's suggestion at p. 38 of its brief that when an Agency must explain how or why certain factors compelled the revocation or denial of a security clearance "it will inevitably be painting a clear picture to hostile entities of the kinds of conduct that are of concern in security determinations and thus will increase their ability to penetrate our military and intelligence agencies undetected" suffers from the grossest hyperbole and illusionary portent of disaster. As the Federal Circuit found, the Board's review of criteria set out in the agency regulation would not threaten disclosure of classified information. The parties already know the typical arguments made by the agency that the alleged misconduct would expose an employee to blackmail; that notoriety reflects adversely on the reputation of the agency; and presents concerns of trustworthiness, reliability, etc. Nothing in this process has or would involve exposure of matters harmful to the national security. These issues have been consistently reviewed now by the Board and the courts without any incident or claim of improper national security breach or disclosure. If a particular case, unimagined by this amicus, remotely suggested this, an in camera examination could be considered. Cf. *Smith v. Schlesinger, supra.*

The citation of cases involving the CIA are a far cry from the instant matters involving, in Egan's case a laborer — WG 3 at the Naval Refit Facility or in Bogdanowicz's case, an equipment worker with the Army. These so-called "hostile entities" need only read the President's executive order to know the types of conduct and factors considered by this government in assessing security risks. There has been nothing in this action which has now reached this Court, in the *Bogdanowicz* case where there was a full Board hearing, or any other Board cases, which has resulted in the disclosure of confidential matters or resulted in a grave compromise to national security.[5] As OPM had recognized in an amicus brief before the Board in this matter, in all the other cases heard before the Board, no agency has asserted that an employee "has sold secrets to a foreign power, committed an act of sabotage, or otherwise affirmatively compromised national security. Nor has it been contended that any of these employees poses (sic) an immediate threat of harm to the national security." (OPM conceded that Section 7532 procedures without Board review are appropriate in these limited number of cases).

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[5] Petitioner's citation to a recommendation by the Subcommittee on Investigations for the consideration of legislation specifying that the Board is authorized to review employment, as opposed to security decisions, appears to be clear recognition that current law permits review of underlying security revocation in the context of adverse action.

The Petitioner's final argument is that the availability of summary removal under 5 USC 7532 provides no support for MSPB review of security clearance determinations under Section 7512. Petitioner attempts to discount the significance of Section 7532 and its availability to remove employees in those cases where such action is necessary in the interests of national security. Petitioner would have a reviewing court ignore Section 7532, when in fact, the CSRA providing for review procedures in Section 7512, excludes 7532 actions from its coverage. Congress obviously recognized that situations involving immediate breaches of national security would not call into play the full review procedures of the MSPB. Cf. *Cole v. Young*, at 544 ("in the absence of an immediate threat of harm to the national security, the normal dismissal procedures seem fully adequate and the justification for summary powers disappears.").

Notwithstanding this exclusion for matters of immediate breaches of security, the Petitioner suggests that Congress devised a departure from the normal review procedures entrusted to the Board for review of Section 7512 adverse actions involving non-emergency security clearance revocation. Incredibly, the Petitioner contends that the Federal Circuit erred in suggesting that the MSPB's limited, virtually nonexistent review provided the anomalous situation of less process than the emergency summary removal procedures under Section 7532.

The Petitioner engages in a comparison of the processes under Section 7532 (declared by OPM to be "draconian") and its concept of the MSPB's review authority under Section 7513. What the Petitioner refuses to acknowledge, is that its view of Section 7512 results in the fundamental denial of *any evidentiary hearing*, pre-termination or post-termination, while at least under Section 7532 there is a post-termination hearing within the agency. As the Federal Circuit quite clearly recognized, this "minimum due process" accorded by the Board would result in a loss of a statutory right to both a hearing and a review of the merits of the agency action, otherwise afforded under Section 7532. The Petitioner choses to simply ignore the due process implications of its posture, as clearly enunciated by the Federal Circuit. As recognized by the court and previously set forth herein, due process under the CSRA requires not only minimal pre-termination procedures, but a full evidentiary post-termination hearing as provided in 5 USC 7513 and 7701(a)(1). *Arnett v. Kennedy, supra; Cleveland Board of Education v. Loudermill, supra.*

Moreover, in drawing its comparison between the statutes, Petitioner confuses due process with status during that process. Indeed, the MSPB review under its scheme is no review at all.[6]

In any event, reference to Section 7532, although illustrative, was not determinative of the Federal Circuit's decision, nor respectfully dispositive for the purpose of this Court's ultimate ruling. Petitioner suggests, to the extent Section 7532 has a bearing on the question of the MSPB's review authority under Section 7513, it reflects a Congressional awareness that determinations based on national security considerations are not appropriate for outside review. Congress' conscious exclusion of Section 7532 from the adverse action procedural mechanism under 7513, in conjunction with the clear recognition by this court in *Cole v. Young* that the normal dismissal procedures are appropriate where an employee is removed for questions relating to issues of national security not of a compelling or emergency nature, inexorably leads to quite the opposite conclusion. Congress recognized that in the routine adverse action case involving security clearance denial or revocation, the processes of Section 7513 must be accorded.

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[6] Moreover, Petitioner's suggestion that the "MSPB may also consider whether the employee is entitled to reassignment to a nonsensitive position in the same facility or agency" was not recognized by the MSPB or part of its review function. Indeed, in applying its holding to Egan's case, the Board merely accepted the Agency's notice of termination that reassignment was not possible without independently analyzing or verifying that assertion.

CONCLUSION

For the aforesaid reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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AMICUS APPENDIX

Appendix A

MSPB first opinion and order in
Bogdanowicz v. Dept. of Army,
Dkt. No. PH07528110587, (Sept. 27, 1983)

Appendix A

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

RALPH B. BOGDANOWICZ v. DEPARTMENT OF THE ARMY	DOCKET NUMBER PH07528110587

OPINION AND ORDER

Appellant was demoted from his position as Electronic Equipment Maker, Installer and Repairer, at the U.S. Army East Coast Telecommunications Center on the basis that he failed to meet the standards for that position in that his Top Secret security clearance was revoked by the agency. The agency's revocation of the security clearance was based on several arrests and convictions dating back to 1950, for being drunk, failure to have valid state automobile tags, speeding, and driving while intoxicated or impaired as well as a prior suspension for sleeping on duty in 1969, which actions indicated a lack of judgment, reliability and trustworthiness.

In her initial decision, the presiding official found that the agency demotion action was taken pursuant to 5 U.S.C. § 7512 and not under 5 U.S.C. § 7532 pertaining to suspension and removal for national security reasons. Initial Decision at 5. She noted that the agency decision letter clearly gave appellant appeal rights to the Board and that the action was based on appellant's inability to meet job requirements, not on national security grounds. She further found that appellant was given proper procedural guidance on the revocation but rejected appellant's contention made at the hearing that the Board should entertain evidence and testimony on the propriety of the revocation, finding that revocation was not an action over which the Board had jurisdiction. *Id* at 4-5. She further found that appellant was not denied due process as to the demotion since the grounds for the demotion were different from those which were the basis for the revocation. *Id.* at 4-5. Furthermore, finding that the charge was supported by a preponderance of the evidence, she found that the agency-imposed penalty of removal was appropriate based on the agency's good faith efforts to retain appellant despite the fact that inability to meet position requirements is reason for removing an employee. *Id.* at 5-6. Therefore, she sustained the agency action.

In his petition for review, appellant contends, *inter alia*, that the presiding official erred in denying his request made at the hearing to introduce evidence and testimony having to do with the merits of the agency's revocation of the security clearance. In support of his contention, he cites the Board's initial decision in *Hoska v. U.S. Department of the Army*, MSPB Docket No. PH07528110029 at 2 (January 29, 1981), *rev'd on other grounds*, 677 F.2d 131 (D.C. Cir. 1982), finding that an analysis of the reasons for the revocation must be made on Board review of the subsequent adverse action since the factual basis of both actions is the same.[1] In its response the agency contends that the Board does not have such authority since pursuant to regulation, the Army Chief of Staff for Intelligence is the final appeal authority for security clearance revocation actions. In addition, it contends that since the agency organization taking the demotion action (East Coast Telecommunication Center) is different from that which took the revocation action (Central Clearance Facility), "the revocation decision was a collateral issue

so attenuated from the removal [sic] action as to be beyond the Board's jurisdiction for merit review." Agency Response at 6.

We find that the Board has authority to review the propriety of the agency revocation of the requisite security classification in connection with its review of an appealable action based thereon since the Board may sustain the action only if it will promote the efficiency of the service. 5 U.S.C. § 7513(a). The Board has consistently found that in order for an agency to sustain its burden to support its decision by a preponderance of the evidence as required by 5 U.S.C. § 7701(c)(1)(B) and 5 C.F.R. § 1201.56, the agency must prove every element of the charge, and demonstrate the propriety of the underlying agency decision. *See, e.g., Bavier v. Department of Transportation*, 5 MSPB 73, 74 (1981), finding that the agency must show the propriety of its decision to deny leave to sustain its charge of absence without leave, and *Ketterer v. U.S. Department of Agriculture*, 2 MSPB 459, 461-3 (1980), finding that in a removal for cause for refusal to accept a reassignment, the agency must show that its decision to reassign the employee was based on legitimate management reasons.

Here, there is no basis for the agency's assertion that the revocation of the security clearance was so far removed from the demotion as to constitute a collateral issue. The demotion action was based upon the revocation. The agency reason for the demotion, as reflected by the underlying specifications of the agency charge, that appellant cannot be allowed to enter restricted areas without an escort or "sanitation" of the restricted area is, in essence, the same as that of the revocation action, *i.e.*, that appellant cannot be trusted to safeguard classified materials. Furthermore, despite the fact that different agency organizations are involved, the agency exhibits in the record show that the decision of appellant's commander not to support the restoration of appellant's security clearance was a primary consideration in the agency's decision to sustain the revocation based on appellant's conduct. See Agency Exhibit No. 1 and Enclosure No. 8. As the Court stated in *Hoska v. United States Department of the Army, Supra,* at 136, 139, where the employee also was removed for failure to retain his Top Secret security clearance under 5 U.S.C. § 7513(a), "the Army's decision to terminate his employment was lawful [only] if the revocation of his security clearance was lawful" and "the legality of . . . [the employee's] dismissal is not an independent issue on appeal."

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[1] Appellant also argues that the revocation of the security clearance violat[illegible]s due process rights and that the agency action was arbitrary and capricious because it was based solely on the revocation. Since we find that the presiding official erred in not entertaining evidence and making findings on the propriety of the revocation, we do not reach these contentions. However, we note that the standard on Board review of an agency action taken pursuant to 5 U.S.C. § 7513(a) is "the preponderance of the evidence" standard. *See In re Van Sciver*, 1 MSPB 94 (1979).

In addition, we do not find that the fact that the Army Chief of Staff for Intelligence is the final appeal authority for revocation actions precludes the Board from considering the propriety of the revocation action. Indeed, for the Board to agree with the agency's position would be to hold that the Board is without jurisdiction to review the action taken pursuant to 5 U.S.C. § 7513(a) at all; there would be nothing for the Board to review, but to simply verify the fact that appellant's security clearance was revoked. The Board would not reach the primary issue as to appellant's demotion of whether the agency has established a specific connection between the conduct which is the basis of the revocation and his ability to safeguard the materials to which his security clearance gives him access. *Hoska v. U.S. Department of the Army, supra,* at 145.

In *Doe v. National Security Agency,* 6 MSPB 467, 470 n.3 (1981), the Board expressly rejected the agency's contention that the Board lacked authority to reinstate access to classified information, stating that it has the authority pursuant to 5 U.S.C. §§ 1205(a), 7513(d), and 7701(a) "to order reinstatement of a Federal employee to his former position regardless of whether the position requires a security clearance." where the agency does not invoke the procedures specified at 5 U.S.C. § 7531-7532 or 50 U.S.C. § 833.[2]/ There, the Board

examined the evidence of the employee's conduct to determine whether the agency established "a general lack of trustworthiness and stability" which impaired the highly sensitive mission of the agency as well as his ability to perform his classified duties. *Id.* Therefore, we find that the presiding official committed reversible error in finding that the grounds of demotion were different from those that were the basis for the revocation action and that the Board did not have jurisdiction to consider and entertain evidence concerning the propriety of the revocation.

Accordingly, the petition for review is GRANTED. The initial decision is VACATED and the case is REMANDED to the Philadelphia Regional Office. On remand the Board's Regional Office shall allow both parties to submit additional evidence on the propriety of the revocation decision and make further findings consistent with this Opinion and Order.

FOR THE BOARD:

Sept. 27, 1983	Robert E. Taylor
Date	Robert E. Taylor Secretary

Washington, D.C.

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[2]/ We recognize that the agency invoked 5 U.S.C. § 7532(b) when it filed its Motion in Limine to bar the parties from litigating the

(Continued)

[2]/ *continued*

issue of the propriety of the revocation. However, as the presiding official found, the agency did not invoke those procedures in demoting appellant which action was taken pursuant to 5 U.S.C. § 7513(a). Therefore, that provision is inapplicable to this case. Nor does it provide a basis for precluding the Board from reviewing the propriety of the agency decision in connection with the demotion action. *Hoska v. U.S. Department of the Army, supra,* at 136-9.

AMICUS CURIAE

BRIEF

Supreme Court, U.S.
FILED
OCT 13 1987
JOSEPH F. SPANIOL, JR.
CLERK

⑨

No. 86-1552

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

◆

DEPARTMENT OF THE NAVY,
Petitioner,

—v.—

THOMAS M. EGAN,
Respondent.

ON WRIT OF *CERTIORARI* TO THE UNITED STATES
COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION AND THE AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON IN SUPPORT OF RESPONDENT

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64 pp

QUESTIONS PRESENTED

1. Whether the Civil Service Reform Act of 1978 precludes review of the merits of a security clearance denial where a civilian employee is removed for "cause" under 5 U.S.C. §7513, and not "in the interests of national security" under 5 U.S.C. §7532.

2. Whether the due process clause of the fifth amendment to the United States Constitution entitles a civilian employee to a hearing on the merits of a dismissal based on a denial of a security clearance.

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INTEREST OF AMICI[1]

The American Civil Liberties Union (ACLU) is a nationwide, non-partisan organization of over 250,000 members dedicated to protecting the rights guaranteed by the United States Constitution. The American Civil Liberties Union of Washington, with more than 6,000 members, is one of its state-wide affiliates. The ACLU has appeared before this Court on numerous occasions representing parties or as amicus curiae.

This case raises important issues concerning the government's power to fire civilian employees. The ACLU has an organizational interest in promoting fair decision-making by government and in ensuring that security clearance determinations fully respect the statutory and constitutional rights of affected employees. Because the ACLU believes that the circumstances of this case require review of the merits of the employee's removal from a civilian position, we submit this brief amicus curiae in support of the respondent and urge affirmance of the judgment below.

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[1] The parties have consented to the filing of this brief, as indicated by their letters of consent filed with the Clerk of the Court.

INTRODUCTION

This case presents two issues: First, whether the Civil Service Reform Act of 1978 precludes review of the merits of a security clearance determination where a civilian employee is removed for "cause" under 5 U.S.C. §7513, and not "in the interests of national security" under 5 U.S.C. §7532. Second, whether due process entitles a civilian employee to a hearing

on the merits of a dismissal based on denial of a security clearance.

The answer to both questions depends, at a minimum, upon a finding "that the President or Congress, within their respective constitutional powers, specifically has decided" against affording the affected employee a full and fair opportunity to challenge the merits of the removal decision. Greene v. McElroy, 360 U.S. 474, 507 (1959). Because the record in this case does not support such a finding, the decision below should be affirmed.

THE STATUTORY FRAMEWORK

The Civil Service Reform Act of 1978 established a Merit Systems Protection Board "to adjudicate employee appeals and protect the merit system[.]" S. Rep. No. 969, 95th Cong., 2d Sess. 50, reprinted in

1978 U.S. Code Cong. & Admin. News 2723, 2724. The Board is authorized to "hear, adjudicate, or provide for the hearing or adjudication, of all matters within the jurisdiction of the Board." 5 U.S.C. §1205(a)(1).

In particular, the Act provides the Board with jurisdiction to review dismissals for "cause" pursuant to §§7512 and 7513. See 5 U.S.C. §7513(d). Under §7513, employees subject to removal for cause are entitled to designated procedural protections within the agency, including 30 days advance notice, a right to answer the charges against them, and a written decision. 5 U.S.C. §7513(b). Dismissed employees then have an automatic appeal to the Board. 5 U.S.C.§7513(d). If the dismissal for cause is based on unacceptable performance, the Board must

find that the agency's decision is supported by substantial evidence, U.S.C. §7701(c)(1)(A). If the dismissal for cause under §7513 is based on a reason other than unacceptable performance, it must be supported by a preponderance of the evidence. 5 U.S.C. §7701(c)(1)(B).

These general procedures do not apply under the Act if the dismissal is based on national security. See 5 U.S.C. §7532. In such cases, the decision of the agency is "final." 5 U.S.C. §7532(b). The agency decision, however, must be preceded by an administrative hearing. 5 U.S.C. §7532(c). Thus, even when the national security provisions of §7532 are invoked, Congress was careful to stipulate that a federal employee could not be dismissed without certain basic procedural safeguards.

STATEMENT OF THE CASE

Amici adopt the statement of the case set forth in the decision below. We nevertheless highlight certain facts relevant to the argument that follows.

Respondent Thomas E. Egan was appointed to a civilian position with the Department of the Navy subject to satisfactory completion of a security report. Following initiation of a National Agency Check Investigation, Mr. Egan was assigned to a "noncritical-sensitive" position as laborer leader.

Ten months later, the Director of Naval Civilian Personnel Command issued a notice of intention to revoke Mr. Egan's security clearance. The proposed revocation was based on Mr. Egan's criminal

record and his past treatment in an alcohol rehabilitation program.[2]

In response, Mr. Egan noted that he had paid his debt to society for his criminal conviction and had fully recovered from his prior alcohol problem.[3] In addition, he had also provided supporting letters attesting both to his personal character and job performance.

On May 27, 1983, respondent received a final determination denying his security clearance. The determination concluded that respondent had failed to explain, mitigate, or refute the government's reasons for the proposed security clearance denial. Respondent was then dismissed from his position by the Navy.

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[2] The exact nature of respondent's criminal record is not entirely clear from the decision below. It appears that he was twice convicted for carrying a loaded firearm and once for second degree assault. 802 F.2d at 1564.

[3] Mr. Egan also explained in his letter to the agency that additional criminal charges uncovered by the background check had been omitted from his employment application because they were either dismissed or occurred outside the seven year period designated on the government's employment form.

As the government properly concedes, respondent's dismissal was not based on §7532 nor did the Navy claim at any time that respondent's dismissal was "consider[ed] ... necessary in the interests of national security." Petitioner's Brief at 5. Rather, the Navy removed Mr. Egan for "cause" under §7513 on the ground that respondent had "'fail[ed] to meet the requirements of his position due to denial of [his] security clearance.'" Ibid.

Ironically, respondent was granted fewer procedural protections under §7513 than he would have received had he in fact been dismissed under §7532. For example,

under §7532(c), respondent would have been entitled to an administrative hearing on the merits of his dismissal. Under §7513, by contrast, he was only permitted a letter response to the government's charges.

Pursuant to 5 U.S.C. §7513(d), respondent appealed to the Merit Systems Protection Board, alleging that his dismissal by the Navy was not supported by a preponderance of the evidence. The government chose not to defend its decision on the merits. Instead, it contended that the Board lacked jurisdiction to review the propriety of the security clearance denial.

The presiding officer rejected the government's jurisdictional objection and reversed its decision to remove Mr. Egan. As a threshold matter, the presiding officer recited the test for evaluating whether an agency has supported an adverse determination by preponderance of the evidence:

> [T]he agency must initially establish the standard for obtaining a security clearance by showing the specific criteria used to determine whether to deny, grant, or revoke the security clearance. Additionally, in order to avoid arbitrary or perfunctory decisions, it must show that these criteria are rationally related with those concerns connected with our national security. Any subsequent investigation of an employee should be evaluated within the framework of these criteria. As a result of its investigation an agency must be able to show how an employee's alleged misconduct has an actual or potentially detrimental effect on national security interests. The final decision made on the basis of such an evaluation must be "reasonable and warranted.

Upon reviewing the record, the presiding officer held that the government had failed to meet both prongs of this test. First, the government failed to "establish" the "specific criteria" upon which it based security clearance removals.

Second, the government "failed to present any evidence showing it [had] conscientiously weighed the circumstances surrounding [Mr. Egan's] alleged misconduct and reasonably balanced it against the interests of national security." In sum, the Navy had "failed to show that it reached a reasonable and warranted decision concerning the propriety of the revocation of [Mr. Egan's] security clearance."

The government then petitioned for review of the presiding officer's decision by the full Board, which accepted the government's argument that the "cause" of an employee's dismissal under §7513 cannot be reviewed by the Board "if it is based on the denial of a security clearance. Specifically, the Board held:

> [I]n an adverse action over which the Board has jurisdiction and which is based substantially on the agency's revocation or denial of a security

> clearance, the Board has no authority to review the agency's stated reasons for the security clearance determination. However, the Board will review the procedures utilized by the agency to ensure that the agency afforded the appellant procedural due process.

Applying this test, the Board found that the presiding officer erred both in reviewing the merits of the government's decision and in reversing the removal action.

Mr. Egan appealed the Board's decision to the United States Court of Appeals for the Federal Circuit, which vacated the Board's decision and remanded for further proceedings. Finding that the Board erred in declining to review the merits of an adverse security clearance determination that the government relied on as "cause" for a removal under §7513, the court stated:

> This case presents no new issues of Board review, and the Board's procedures will be no different than they have been during the years the Board has exercised the authority it now seeks to abdicate.
>
> ***
>
> We conclude that the heavy weight of law and precedent, congressional interest, and fundamental rights, require that the agency action taken in Egan receive the same appellate review as other adverse actions taken under 5 U.S.C. §7512.

This appeal followed.

SUMMARY OF ARGUMENT

The central issue in this case is whether the government may foreclose any meaningful review of its decision to dismiss a civilian employee for alleged security reasons, when the government has neither invoked the relevant security provisions of the applicable statute nor provided even the minimal protections statutorily available in security cases.

Under the Civil Service Reform Act of 1978, an employee dismissed for "cause" under §7513 is entitled to review before the Merit Systems Protection Board. Moreover, the dismissal may not be upheld unless it is supported by at least a preponderance of the evidence. The only exception to this scheme is when the government dismisses an employee based on the national security provisions of §7532 rather than for "cause" under §7513.

Here, the government claims that it may proceed under §7513 but ignore the procedural protections required by Congress in §7513 cases. Nothing in the language or history of the Act supports the government's strained interpretation.

Likewise, there is no support for the government's claim that the decision below is inconsistent with Executive Order 10450,

which established a security clearance program. As the court below noted, the Executive Order is "entirely consistent with the civil service laws . . . and does not purport to preclude the application of these laws."

Finally, any interpretation of the Civil Service Reform Act that precluded meaningful review of petitioner's dismissal would violated due process under the three-part test announced by this Court in Mathews v. Eldridge, 424 U.S. 319 (1976).

ARGUMENT

I. AN AGENCY'S DECISION TO DISMISS AN EMPLOYEE FOR "CAUSE" UNDER 5 U.S.C. §7513 IS REVIEWABLE BY THE MERIT SYSTEMS PROTECTION BOARD, EVEN WHEN BASED ON THE DENIAL OF A SECURITY CLEARANCE

Contrary to the government's assertion, this case does not require the

Court to pass on the scope of the President's discretion "to determine whether an individual is sufficiently trustworthy to occupy a position in the Executive Branch that will give him access to [classified] information." Petitioner's Brief at 15. Rather, the issue before the Court is whether Congress intended the MSPB to review the merits of a removal action in the national security context where the government fires an employee for cause under §7513 of the Civil Service Reform Act, and does not invoke the "national security" provisions of §7532.

The government merges these separate questions by arguing that §7513 -- which provides without exception for Board review of removal actions under a preponderance of the evidence standard -- cannot mean what it says under the circumstances of this

case. As demonstrated below, the government's strained interpretation of §7513 is plainly contrary to congressional intent.

A. The Standard of Review

The government attempts to insulate its decision to fire Mr. Egan by arguing that the Board's interpretation of its own jurisdiction under §7513 is entitled to substantial weight. That assertion is inconsistent with this Court's recent decisions.

"[A]s an administrative tribunal created by Congress, [the Board] has only that jurisdiction granted it by the statutes empowering it to act." Atwell v. Merit Systems Protection Board, 670 F.2d 272, 280 (D.C.Cir. 1981). The question whether Congress afforded the Board power to review the merits of a security clearance denial under §7513 "is a pure question of statutory construction for the courts to decide." INS v. Cardoza-Fonseca, 480 U.S. ___, 94 L.Ed.2d 434, 437 (1987). "The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent." Chevron U.S.A., Inc. v. National Resources Defense Council, 467 U.S. 837, 843 (1984).

B. Presumption of Review

In rejecting the Board's interpretation of its enabling statute, the court below acknowledged "the strong presumption that Congress intends judicial review of administrative action." Bowen v. Michigan Academy of Family Physicians, 476 U.S.___, 90 L.Ed.2d 623, 628 (1986). As this Court has made clear, "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access and judicial review." Lindahl v. OPM, 470 U.S. 768, 778 (1985), quoting Abbott Laboratories v. Gardner, 387 U.S. 136, 141 (1967).

The government can point to no clear expression by either Congress or the President to exempt from Board review removal decisions based on security clearance denials under §7513. To the contrary, the plain language of the Civil Service Reform Act and its history clearly support the Federal Circuit's decision that the Board improperly refused to review the merits of the government's decision to remove Mr. Egan under §7513.

C. The Plain Language of the Statute

Questions of statutory construction "must begin with the language of the statute itself." Touche Ross & Co v.

Redington, 442 U.S. 560, 568 (1979). "[A]bsent a clearly expressed legislative interpretation to the contrary, that language must ordinarily be regarded as conclusive." Consumer Product Safety Commission v. GTE Sylvania, 447 U.S. 102, 108 (1980)(emphasis added).

Here, the language of the statute could not be plainer. Section 7513(d) clearly states: "An employee against whom an action is taken under this section is entitled to appeal to the Merit Systems Protection Board under Section 7701 of this title."

Neither §7513 nor §7701 exempts removal decisions based upon a denial of a security clearance from review on the merits by the Board. The sole statutory exemption from Board review in the area of national security is for personnel actions

under §7352 -- which the government did not invoke in this case. Moreover, even that exemption works against the government in this case.

Under §7532, the government may discharge an employee if "necessary in the interests of national security" and the employee may not appeal to the Board. Had Congress assumed that employment decisions for national security reasons were automatically exempt from Board review under §§7513 and 7701, the specific exemption for Board review of actions under §7532 would be redundant.

For understandable reasons, the government's brief tries to ignore the language of §7513 and the dual track system that Congress carefully designed in the national security context. Instead, the government argues that the absence of review under §7532 must be read to preclude review of the merits even when the government relies on §7513.

The government suggests that §7532 is a drastic procedure whose use should be avoided if reliance on §7513 is possible. The government's desire to avoid §7532, however, simply does not justify the government's effort to restrict the normal scope of Board review when an agency opts for removal pursuant to §7513. To the contrary, having determined that national security concerns do not warrant invocation of §7532, the agency should not be able to insulate its action under §7513 by asserting national security interests.

Here, the government removed Mr. Egan under §7513, not §7532; indeed, the government nowhere disputes that Mr. Egan is entitled to Board review. That review

requires the government to prove its case, including the legitimacy of its reasons for firing Mr. Egan, by a preponderance of the evidence. As the court below observed:

> [I]n effecting the removal of government employees on national security grounds, ... such removal may be brought under Section 7512 or Section 7532. The agency is responsible for selecting the removal procedure in the particular circumstance. Each procedure will entail different benefits and burdens for both the agency and the employee.
>
> Having chosen to remove Mr. Egan under Section 7512 rather than Section 7532, the agency has chosen the procedure that carries Board review under Section 7513.

D. Legislative History

Faced with an unambiguous history, it is the government's burden to demonstrate clear legislative history in support of its interpretation of §7513. Consumer Product Safety Commission v. GTE Sylvania, 447 U.S. at 108. Far from meeting that burden, the government is unable to point to any legislative history indicating congressional intent to restrict Board review in §7513 cases merely because the government cites a security clearance denial as the cause for its dismissal action.

Indeed, only last year Congress explicitly acknowledged, albeit critically, judicial decisions upholding the Board's jurisdiction to review the merits of a security clearance denial under §7513. S. Rep. No. 99-230, 99th Cong., 2d Sess. 17 (1986).[4] Whatever disagreements petitioner may have with the scope of the Board's review, it is the role of Congress - not the courts or the Executive Branch - to amend the law.

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[4] "Federal Government's Security Clearance Programs," Report of the Permanent Subcommittee on Investigations of the Senate Committee on Governmental Affairs (Jan. 22, 1986).

E. Administrative Construction

Petitioner claims that the Board has "repeatedly ruled that it does not have jurisdiction to review the merits of agency personnel decisions (especially military decisions) that do not constitute 'adverse actions' . . ." Petitioner's Brief at 25.[5] The Board's decisions, however, do not support that characterization.

To the contrary, the Board has reviewed the government's reasons and determinations leading to a removal decision in a wide variety of contexts. E.g., Ketterer v. United States Dep't of Agriculture, 2 M.S.P.R. 294 (1980)(proof by a preponderance of the evidence that removal will promote the efficiency of the service necessarily includes a demonstration that the agency's decision to reassign the employee was a bona fide determination based on legitimate management considerations in the interest of the service); *Bavier v. Department of Transportation*, 4 M.S.P.R. 548 (1981) (preponderance of the evidence standard extends to every element of the charges, including the propriety of the decision to deny leave); *Brewer v. American Battle Monuments Comm'n*, 779 F.2d 663 (Fed. Cir. 1985)(reasons for reassignment and reduction in grade reviewed).

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[5] The government also argues that §7513 limits Board jurisdiction to appeals from "adverse actions." Petitioner's Brief at 23. The Civil Service Reform Act no longer refers to "adverse actions" but rather to removals or suspensions. 5 U.S.C. §7512.

Even in agency-wide reductions in force ("RIF"), the Board has reviewed the basis for the agency action to assure its validity and proper application. *E.g.*,

Huber v. Merit Systems Protection Bd., 793 F.2d 284 (Fed. Cir. 1986), *cert. denied*, ___ U.S. ___, 107 S.Ct. 907 (1987);[6] *Bacon v. Department of Housing & Urban Development*, 757 F.2d 263, 268 (Fed. Cir. 1985).

Thus, the Board has consistently recognized its authority to review an agency's reasons for revoking clearances in order to protect affected employees from arbitrary government action. *E.g.*, *Bogdanowicz v. Department of the Army*, M.S.P.B. Docket No. PH0752811-0587; *Schwartz v. Department of the Army*, M.S.P.B. Docket No. NY07528-11226; *Doe v. National Security Agency*, 6 M.S.P.B. 467

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[6] In *Huber* the court "discern[ed] no restraint, in the statute or regulations, on the Board's authority in review of administrative personnel actions." 793 F.2d at 287 (citations omitted). As the court noted, "[i]t is routine for the Board to review the form of agency actions to determine whether they were proper RIF actions." *Ibid*.

(1981); Brandt v. Department of the Navy, M.S.P.B. Docket No. D7528310774 (July 12, 1984). The Board's decision below marks a sharp and unexplained departure from past practice.

More significantly, the Board's ability to determine whether an agency has abused the law would be precluded if an underlying decision which results in removal could not be reviewed. In effect, an agency could arbitrarily deny a security clearance as a way of achieving a predetermined removal decision without meeting the statutory requirement that such action be taken "only for such cause as will promote the efficiency of the agency." 5 U.S.C. §7513(a).

F. Case Law

The Board's power to review the merits of a security clearance denial in actions

under §7513 has also been judicially upheld.

For example, Hoska v. United States Department of the Army, 677 F.2d 131 (D.C. Cir. 1982), involved the government's dismissal of an Intelligence Operations Specialist under §7513. On appeal, the court reversed the Board's determination to sustain the removal. The court stated:

> [I]t is well established that an adverse personnel action cannot withstand judicial scrutiny unless there is some rational nexus between the adverse action taken and the government's reasons for the action.
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> ***
>
> Courts have been equally vigilant in requiring a rational nexus between the denial or revocation of an individual's security clearance and the individual's conduct or other evidence relied upon by the government in denying or revoking the clearance.

Id. at 137. See also Gayer v. Schlesinger, 490 F.2d 740 (D.C.Cir. 1973); McKeand v. Laird, 490 F.2d 1262 (9th Cir. 1973).

The government insists that Hoska was wrongly decided for two reasons. First, the government argues that security clearances are denied for reasons "unknown and unknowable." In the vast majority of cases, that it simply not so. Here, for example, the government could have cited its own published regulations.[7] Second, the government disputes the Board's expertise to review security clearance decisions.

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[7] In Mr. Egan's case, presumably the government could have cited its own regulations:

> h. Criminal or dishonest conduct;
>
> * * *
>
> j. Habitual or episodic use of intoxicating beverages to excess; and
>
> k. Abuse of, or addiction to, narcotics, drugs, or other controlled substances.

OPNVINST 5510.1F, paragraph 16-102.2.

The Board, however, routinely evaluates such factors as loyalty, reliability, trustworthiness and judgment. In that regard, this case is neither different nor more difficult than standard Board fare.

The government's reliance the Administrative Procedure Act is likewise misplaced. The APA forecloses judicial review of agency actions when the "action is committed to agency discretion by law." 5 U.S.C. 701(a)(2)(1982). The question in this case is whether a statutorily created body which regularly reviews the government's personnel decisions may decline to review the reasons for the firing decision in this case. Absent some explicit exemption which the Civil Service Reform Act does not provide, review by the Board cannot be abandoned.

Nor can the government claim that the Act is drawn so that the Board (or a court) would have no meaningful standard against which to assess the agency's exercise of discretion. See Heckler v. Chaney 470 U.S. 821, 830 (1985); Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 410 (1971). Here, §7701 furnishes a preponderance of the evidence standard by which the Board is to assess the government's removal action. Petitioner, therefore, cannot show that there is "no law to apply." Citizens to Preserve Overton Park, Inc., 401 U.S. at 410.

Faced with clear authority upholding the Board's power to review the merits of a dismissal based on a security clearance denial under §7513, the government seeks to rely on cases in which the Board has refused to review removal decisions

affecting military and not civilian employees. See Zimmerman v. Department of the Army, 755 F.2d 156, 157 (Fed. Cir. 1985); Buriani v. Department of the Air Force, 777 F.2d 674, 677 (Fed. Cir. 1985); Tennessee v. Dunlap, 426 U.S. 312 (1976). These cases are inapposite.

Zimmerman, Buriani, and Dunlap involved civilian employees with "dual status" who had to maintain military reserve or national guard status as a condition of retaining civilian employment with the military. Because "[t]he military constitutes a specialized community governed by a separate discipline from that of the civilian,"[8] the Board was deemed to lack the power to review the merits of a military transfer or promotion.

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[8] Zimmerman v. Department of the Army, 755 F.2d at 157, citing Orlof v. Willoughby, 345 U.S. 83, 94 (1953).

By contrast, this court has recognized that the military's special need for "strict discipline" and "obedience to orders" is unique and not present in the civilian context. See Chappell v. Wallace, 462 U.S. 296, 300 (1983); Schlesinger v. Councilman, 420 U.S. 738, 757 (1975).

Moreover, the Board has clear Congressional authority to exempt military employees from its examination because the civil service laws do not cover military service. See 5 U.S.C. §§2101-2102. No such authority exists to exempt security clearance decisions from Board review except, of course, for §7532, which was not invoked in this case.

The government's is similarly off base in its attempt to rely on Board decisions refusing to examine the underlying basis for criminal convictions or bar

decertifications, when those determinations result in the removal of federal civilian employees. See Crofoot v. United States Government Printing Office, 21 M.S.P.R. 248, 252 (1984), rev'd on other grounds, 761 F.2d 661 (Fed. Cir. 1985)(Board does not examine reasons behind criminal convictions); McGean v. N.L.R.B., 15 M.S.P.R. 49 (1983)(Board has no authority to review bar decertification decision).

In each of these cases, the lower court properly found that the forums which determine bar certification and criminal convictions are not federal agencies and that the Board was, therefore, without authority to review their actions and provide an avenue for collateral attack. Egan, 802 F.2d at 1571. Here, respondent's challenge is direct not collateral.

Without meaningful Board review, he will be denied any forum to litigate his claim.

G. National Security

Absent statutory language or legislative history to support its position, petitioner falls back on the claim that national security secrets may be jeopardized if security clearance denials are subject to review under §7513. However, as noted by the Federal Circuit,

> overstatement infects the Boards's position that "it would inevitably be faced with agency exposition of highly sensitive materials". Egan, 28 MSPR at 518 ... The Board's decision to refrain from review of all such actions taken under 5 U.S.C. 7512 does not distinguish between sensitive and nonsensitive cases.

Egan v. Department of Navy, 802 F.2d at 1571.

If any sensitive information were implicated in this or a similar case, the government has ample authority to protect

the secrecy of that information. For example, the government can invoke the state secrets privilege. See United States v. Reynolds, 345 U.S. 1 (1953). This privilege has proven a reliable shield when civil litigation threatens the disclosure of information that the government believes must be kept secret in the interests of national security. E.g., Salisbury v. United States, 690 F.2d 966 (D.C.Cir. 1982). Needless to say, it was not claimed here.

II. THE EXECUTIVE HAS NOT EXEMPTED REMOVALS BASED ON SECURITY CLEARANCE DENIALS UNDER SECTION 7513 FROM REVIEW ON THE MERITS BY THE BOARD

The government contends that the decision below is inconsistent with Executive Order ("Order") 10450, 3 C.F.R. 936 (1953), reprinted as amended in 5

U.S.C. §7311 note, which establishes a security clearance program and enables an agency head to dismiss employees when retention is not clearly in the interest of national security. To the contrary, the Order underscores the need for full and fair procedures in implementing security clearances:

> [T]he American tradition that all persons should receive fair, impartial, and equitable treatment at the hands of the Government requires that all persons seeking the privilege of employment or privileged to be employed in the departments and agencies of the Government be adjudged by mutually consistent and no less than minimum standards and procedures among the departments and agencies governing the employment and retention in employment of persons in the Federal service.

Most basically, the Order simply does not address the jurisdiction of the Board; rather, it sets out factors relevant to whether a person's employment is consistent with the interest of national security.

Exec. Order 10450 at 8. As noted by the court below: "The Executive Order establishes responsibilities within the executive branch, and is entirely consistent with the civil service laws before us. It does not purport to preclude the application of these laws." Egan v. Department of the Navy, 802 F.2d at 1570.

In the absence of deliberate language curtailing the normal application of §7513, this Court should read the Order as consistent with full review by the Board under a preponderance of the evidence standard. See Doe v. Weinberger, No. 86-5395, slip op. (D.C.Cir. June 9, 1987).[9]

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[9] In Doe v. Weinberger, the National Security Agency revoked an employee's security clearance pursuant to 50 U.S.C. 831-832. When the Director of the NSA notified the employee that his employment would be terminated, the employee asserted a right to a pre-termination hearing under 5 U.S.C. 7532. The government argued that although the agency was covered by 7532, an agency could (continued...)

III. GIVEN MR. EGAN'S INTEREST IN RETAINING HIS LIVELIHOOD, THE RECOGNIZED VALUE OF A HEARING IN EMPLOYEE REMOVAL DECISIONS, AND THE AGENCY'S WEAKER INTEREST IN AVOIDING THE BURDEN OF JUSTIFYING ROUTINE SECURITY CLEARANCE DECISIONS, FIFTH AMENDMENT DUE PROCESS REQUIRES THAT THE BOARD REVIEW THE MERITS OF THE NAVY'S DECISION TO REMOVE A CIVILIAN EMPLOYEE UNDER SECTION 7513

This Court has formulated a three part test to determine what kind of process is due when a liberty or property interest is impaired by government action. Mathews v. Eldridge, 424 U.S. 319 (1976). The three broad criteria are as follows:

1) "the private interest that will

9/ (...continued)
grant an employee less protection if it could rely on an alternative statute. In rejecting this contention, the D.C. Circuit Court of Appeals relied on the fact that the alternative statutes did not purport to supersede the pre-termination hearing requirement of 5 U.S.C. 7532. Similarly, the Executive Order 10450 is silent as to the reviewability of an agency's security clearance decision when it is the basis for a dismissal under 5 U.S.C. §7513, which grants MSPB review.

be affected by the official action;"

2) "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards;" and

3) "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."

Id. at 319.

Using this analysis, it is clear that the Constitution requires some kind of hearing on the merits of a §7513 dismissal based on a security clearance denial or revocation. Under the government's approach, respondent would review none.10/

10/ It is important to emphasize that the government's interpretation of §7513 would deny respondent a meaningful review of his dismissal at every state - agency, Board and court. As noted previously, even classic national security dismissals under §7532 are surrounded by greater procedural safeguards.

A. A Decision to Deny a Civilian Public Employee a Security Clearance Based on Failing to Disclose Past Behavior Deprives the Employee of a Significant Property and Liberty Interest When the Decision Leads to Removal.

As a non-probationary public employee who completed one year of employment in the same or similar position, Mr. Egan can be removed only for such cause as will promote the efficiency of the service. See 5 U.S.C. §§7501, 7512 and 7513. It follows that Mr. Egan has a property interest in continued employment which entitles him to due process upon termination. See Cleveland v. Loudermill, 470 U.S. 532, 535-539 (1985); see also Board of Regents v. Roth, 408 U.S. 564 (1972).

The existence or lack of a separate property interest in securing a security clearance makes no difference as long as the denial of a clearance infringes on a property interest in employment. Mr. Egan has "the right to be free from unauthorized actions of government officials which substantially impair his property interests." Greene v. McElroy, 360 U.S. 474, 493 n.22 (1959). For instance, Mr. Egan may not be entitled to the equipment used in his job. But, if the supervisor denies him access to the equipment which results in Mr. Egan's "refusal" to do his work, the agency can not reasonably argue that his lack of a property interest in the equipment negated his property right in continued employment. Similarly, Mr. Egan has a right to be free from an unauthorized denial of a security clearance which impairs his interest in retaining employment.[11]

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[11] In this Court's two previous cases involving the loss of employment based on the (continued...)

Mr. Egan also has a liberty interest that is protected by the Fifth Amendment because his removal and the documentation of the Navy's decision to deny him a security clearance in the government's central files inflict a stigma on him that will impair his ability to gain employment in the future.

"The Court has recognized the serious damage that could be inflicted by branding a government employee as 'disloyal,' and thereby stigmatizing his good name." Paul v. Davis, 424 U.S. 693, 706 (1976). When that stigma is combined with adverse government action, such as termination of employment, the deprivation rises to the

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11/ (...continued)
denial of a security clearance the Court has not analyzed the interest in employment as dependent on the right to a security clearance. See Greene v. McElroy, 360 U.S. 474 (1959), and Cafeteria Workers v. McElroy, 367 U.S. 886 (1961).

level of a denial of a liberty interest sufficient to invoke due process. See Paul v. Davis, supra; Owen v. City of Independence, 445 U.S. 622, 633 n.13 (1980).

Here, the Navy must report it's "[f]inal adverse personnel security actions based on Defense Investigative Service ("DIS") investigations to DIS for recording in the Defense Central Index of Investigations . . ." OPAVINST 5510.1F, paragraph 16-105.6. Thus, the Navy's negative assessment of Mr. Egan's trustworthiness as well as its opinion that he falsified his employment application is available to the Office of Personnel Management and other agencies. Egan v. Department of Navy, 802 F.2d 1563, 1573 (Fed. Cir. 1986). Such records will "make it difficult, perhaps impossible, for Mr.

Egan to obtain future government employment." Egan, 802 F.2d at 1573.

Cafeteria Workers v. McElroy, 367 U.S. 886 (1961), is not inconsistent with this conclusion. In Cafeteria Workers, a security guard withdrew the security badge of a short order cook. This Court held that a liberty interest had not been denied based on a specific finding that no badge of disloyalty or infamy was associated with the action and that the cook's opportunity to work for her private employer (who operated the cafeteria at the naval facility) was not affected. Id. at 898-899. AS noted by the Federal Circuit, "[t]he same cannot be said for Mr. Egan." Egan, 802 F.2d at 1573.

The Navy's security clearance determination which caused Mr. Egan to lose his employment and which will prevent or

substantially impair his ability to get similar employment, therefore deprived Mr. Egan of a liberty interest for due process purposes.

B. This Court Has Recognized the Importance of a Full Hearing when a Person is Deprived of Property and Liberty Interests in Employment.

This Court has "frequently recognized the severity in depriving a person of the means of livelihood." Cleveland v. Loudermill, 470 U.S. 532, 543 (1985). In addition, the Court has asserted the importance of a due process hearing to review such deprivations. Id. at 542.

While the procedures afforded Mr. Egan are similar to those recognized as sufficient in Loudermill prior to termination, the Court in that case explicitly relied on the existence of a full post-termination hearing. Id. at 547 n.12. Thus, this Court has acknowledged that even with the existence of pre-termination procedures such as Mr. Egan was afforded, a full hearing is required at some point when a person's property and liberty interests in employment have been injured. See also Arnett v. Kennedy, 416 U.S. 134, 178 (1974)(White, J., concurring).

The government's suggestion that due process is satisfied by Board review to ensure that Mr. Egan was indeed denied a security clearance makes a mockery of due process and turns the hearing into a mere formality. The fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner." Armstrong v. Manzo, 380 U.S. 545, 552 (1965).

In essence, the right to due process guarantees that the United States government will not arbitrarily deprive a person of his or her property or liberty. See Dent v. West Virginia, 129 U.S. 114, 123 (1889). The purpose of the hearing is not simply to satisfy the reviewing board that the agency's own procedures are followed, but to provide the deprived citizen and opportunity to challenge arbitrary and capricious decisions.

C. Petitioner's Interest in Avoiding an Explanation for Denying or Revoking a Security Clearance Which is the Basis for Terminating an Employee Under Section 7513 Does Not Outweigh the Employee's Right to a Hearing.

As argued above, the government's use of "national security" as a talisman to ward off review in all security clearance decisions is unwarranted. Cases where divulging the reasons for denying or revoking a security clearance will release sensitive information undoubtedly exist. In these instances, §7532 is clearly available to summarily remove the employee. However, the government cannot articulate any sensitive information that was used to decide Mr. Egan's case. As the lower court stated, there is a distinction between sensitive and non-sensitive cases. Egan v. Department of Navy, 802 F.2d 1563, 1571 (Fed. Cir. 1986).

The government asserts that having to explain the revocation or denial decision could help hostile entities to penetrate our military or intelligence agencies. Petitioner's Brief at 38. However, any employment guideline which notifies an employee of the type of behavior that would constitute cause to dismiss could aid infiltrators. Such reasoning cannot justify, in a democratic society, the wholesale sequestering of criteria used to ultimately deprive a citizen of his or her means of livelihood.

Furthermore, the government's assertion belies the fact that the Navy's own regulations divulge specific criteria for adverse determinations. OPNAVINST 5510.1F. Even where national security is threatened, Congress has provided that the suspended employee be given as much information as possible concerning the reasons for the suspension. See 5 U.S.C. 7532.

If the government can shield the bases for its decision behind a cloak of "unknown and unknowable" security clearance determinations, even in situations where the ostensible reason for denying a clearance is obvious, then the employee is left with no meaningful check on arbitrary and capricious agency action. This Court's decisions do not justify such a gaping exception to the due process clause.

CONCLUSION

For the reasons stated above, the decision below should be affirmed.

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